91-535

No. 91-_____

IN THE

Supreme Court of the United States

OCTOBER TERM, 1991

ALAN B. BURDICK,

Petitioner,

—v.—

MORRIS TAKUSHI, Director of Elections, State of Hawaii; JOHN WAIHEE, Lieutenant Governor of Hawaii; BENJAMIN CAYETANO, in his capacity as Lieutenant Governor of the State of Hawaii,

Respondents.

PETITION FOR A WRIT OF *CERTIORARI* TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

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QUESTION PRESENTED

Whether Hawaii's blanket prohibition against write-in voting in all general and primary elections unreasonably and unjustifiably denies its citizens the right to express their support for candidates of their own choosing and to participate fully and freely in the electoral process, as guaranteed by the United States Constitution.

LIST OF PARTIES

The caption of the case contains the names of all parties.

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Petitioner Alan B. Burdick respectfully requests that a writ of *certiorari* issue to review the judgment and opinion entered in this case by the United States Court of Appeals for the Ninth Circuit on June 28, 1991.

OPINIONS BELOW

The June 28, 1991 opinion of the United States Court of Appeals for the Ninth Circuit is reported at 937

F.2d 415 (9th Cir. 1991), and is set forth in the Appendix to this Petition at 1a-17a. The March 1, 1991 opinion of the Ninth Circuit which was withdrawn and superseded by the June 28, 1991 opinion is reported at 927 F.2d 469 (9th Cir. 1991), and is set forth in the Appendix to this Petition at 18a-31a.

The opinion and order of the United States District Court for the District of Hawaii, dated May 10, 1990, granting plaintiff's motion for summary judgment and permanent injunctive relief is reported at 737 F.Supp. 582 (D.Haw. 1990), and is set forth in the Appendix to this Petition at 32a-51a.

The opinion of the Hawaii Supreme Court, dated July 21, 1989, in response to certified questions from the United States District Court is reported at 776 P.2d 824 (1989), and is set forth in the Appendix to this Petition at 52a-55a.

The July 19, 1988 order certifying questions of Hawaii law to the Supreme Court of Hawaii is unreported. It is set forth in the Appendix to this Petition at 56a-57a. The August 9, 1988 Amended Certification from the United States District Court for the District of Hawaii to the Hawaii Supreme Court is set forth in the Appendix to this Petition at 58a-60a. The May 17, 1988 decision of the United States Court of Appeals for the Ninth Circuit is reported at 846 F.2d 587 (9th Cir. 1988), and is set forth in the Appendix to this Petition at 61a-66a. The decision, order and opinion of the district court, dated September 29, 1986, granting plaintiff's motion for summary judgment and injunctive relief is unreported. It is set forth in the Appendix to this Petition at 67a-77a.

JURISDICTION

The United States Court of Appeals for the Ninth Circuit entered an opinion and judgment in this case on

March 1, 1991. A timely petition for rehearing along with a suggestion for rehearing *en banc* was submitted to the court of appeals. On June 28, 1991, the court of appeals withdrew its March 1, 1991 opinion; denied the petition for rehearing; rejected the suggestion for rehearing *en banc*; and entered a new opinion and judgment. This petition for a writ of *certiorari* is taken from the June 28, 1991 opinion and judgment of the United States Court of Appeals for the Ninth Circuit pursuant to 28 U.S.C. §1254(1).

CONSTITUTIONAL AND STATUTORY PROVISIONS

The pertinent provisions of the First and Fourteenth Amendments to the United States Constitution, as well as Hawaii Revised Statutes §§12-1, 12-2, 12-41, 16-1, 16-22, and 16-26, are set forth in the Appendix to this Petition at 78a-81a.

STATEMENT OF THE CASE

This case involves the most basic of all constitutional liberties -- the right of citizens to vote for the candidates of their choice. Specifically, Hawaii state officials have interpreted the Hawaii election laws as prohibiting individuals from submitting write-in ballots in primary and general elections held for state and federal offices. And, in so doing, Hawaii officials deprive citizens of the right to express their dissatisfaction with the range of choices presented on the ballot and to vote, instead, for candidates of their own personal preference. At issue in this case is whether Hawaii's prohibition against write-in voting can withstand serious judicial scrutiny as required by the federal Constitution.

Petitioner Alan B. Burdick is and has been throughout the life of this litigation a resident and registered voter in the City and County of Honolulu, Hawaii. In

recent years, petitioner frequently found himself dissatisfied with the choice of candidates appearing on the ballot. All too often he found that none of the candidates listed on the ballot represented his views or shared his positions with respect to significant public policy matters. Accordingly, in June, 1986, petitioner notified Hawaii election officials that he wanted to cast write-in votes in the then upcoming primary and general elections. The election officials responded to Burdick's inquiry by informing him that Hawaii law does not explicitly provide for write-in voting and that, consequently, were he to try to execute a write-in ballot, it would not be counted. R.A.257.[1]

Subsequently, Hawaii election officials provided Burdick with a copy of an opinion letter, dated July 11, 1986, issued by the Attorney General's Office. This opinion letter rested upon the premise that the Hawaii election law contained no provision requiring that write-in voting be permitted. The letter went on to conclude that neither the legislature nor Hawaii election officials were required, as a matter of constitutional principle, to permit write-in votes. R.A.261-62. Burdick was especially concerned about this interpretation of the Hawaii election law because, in 1986, the state house of representatives election held in the district in which Burdick lived and voted featured only one candidate, running unopposed. And Burdick had no interest in voting for that candidate. R.A.257.

Proceedings Below

Petitioner filed suit in August, 1986 in the United States District Court, District of Hawaii. He named as defendants Morris Takushi and John Waihee who, at the time of the commencement of the action, were Hawaii's

[1] References preceded by "R.A." are to portions of the record as set forth in Appellants' Excerpts of Record filed in the Ninth Circuit.

Director of Elections and Lieutenant Governor[2] respectively. The suit, seeking declaratory and injunctive relief and attorneys' fees, was commenced pursuant to 42 U.S.C. §1983. It alleged that defendants' denial of petitioner's right to cast a write-in ballot for the representatives of his choice violated the First, Fifth, Ninth and Fourteenth Amendments to the United States Constitution and that it violated, as well, the Hawaii Constitution.

The district court held that Hawaii's refusal to permit write-in voting constituted a violation of petitioner's freedom of expression and association. Accordingly, the district court issued injunctive relief directing Hawaii to provide for the casting and counting of write-in votes in the November, 1986 elections. 67a-78a. The state moved in the district court for a stay of the injunction pending appeal and the motion was denied.

An appeal was taken to the Court of Appeals for the Ninth Circuit, which stayed the injunction pending disposition of the appeal. On May 17, 1988,[3] the Ninth Circuit reversed and directed the district court to abstain -- under the *Pullman* abstention doctrine -- from reaching the federal constitutional questions on the ground that the case raised outstanding questions of state law that needed to be resolved preliminarily. 846 F.2d 587 (9th

[2] Under Hawaii law the Lieutenant Governor is responsible for the conduct of elections for state and federal offices. Haw. Rev. Stat. §11-2.

[3] Fearing that the Ninth Circuit might not decide the appeal prior to the September, 1988 primary election, Burdick filed a second suit entitled *Burdick v. Cayetano*, Civil No. 88-0365, seeking relief in connection with the then forthcoming 1988 elections. Burdick filed the second suit on May 17, 1988 unaware that, on that same day, the Ninth Circuit had decided the appeal in the first suit. The two actions were later consolidated at the district court and on appeal. This petition for a writ of *certiorari* is taken from the June 28, 1991 decision of the Ninth Circuit in the consolidated appeal.

Cir. 1988).

On remand, the district court certified three questions to the Hawaii Supreme Court. 56a-57a, 58-60a. The questions, involving interpretations of state law and the state constitution, were as follows:

> (1) Does the Constitution of the State of Hawaii require Hawaii's election officials to permit the casting of write-in votes and require Hawaii's election officials to count and publish write-in votes?
>
> (2) Do Hawaii's election laws require Hawaii's election officials to permit the casting of write-in votes and require Hawaii's election officials to count and publish write-in votes?
>
> (3) Do Hawaii's election laws permit, but not require, Hawaii's election officials to allow voters to cast write-in votes, and to count and publish write-in votes?

In an opinion issued July 21, 1989, the Hawaii Supreme Court answered each of the certified questions in the negative concluding that Hawaii law prohibited write-in voting and that such a prohibition was entirely consistent with the Hawaii Constitution. 776 P.2d 824, 825 (Haw. 1989). 52a-55a.

Burdick thereupon renewed his motion for summary judgment in the federal district court. On May 10, 1990, the district court again held that Hawaii's prohibition against write-in voting violated the federal Constitution. And, the district court again issued injunctive relief directing state officials to permit the casting and counting of write-in ballots. But, on this occasion, the district court stayed its mandate pending appeal. 737 F.Supp. 582 (D.Haw. 1990). 32a-51a.

On appeal, the Ninth Circuit reversed in an opinion issued March 1, 1991. 18a-31a. Burdick petitioned for rehearing with a suggestion of rehearing *en banc*. On June 28, 1991, the Ninth Circuit denied the petition for rehearing and rejected the suggestion for rehearing *en banc*. But, the court of appeals also withdrew its March 1, 1991 opinion and issued a new opinion which, nonetheless, reversed the district court's decision granting plaintiff's motion for summary judgment and injunctive relief. 1a-17a.

In reversing the district court's decision, the Ninth Circuit found that Hawaii's restriction on write-in voting did not constitute a substantial burden on Burdick's right to vote. In this regard, the court below concluded: "Although Burdick is guaranteed an equal voice in the election of those who govern, Burdick does not have an unlimited right to vote for any particular candidate." 10a. The court further concluded that Hawaii's restriction imposed no substantial burden upon Burdick's right of political expression. The court reasoned that if, by executing a write-in ballot, Burdick simply sought to express his disapproval of the candidates whose names appeared on the ballot, petitioner had "ample alternative channels" by which to communicate his views. 11a.

The Ninth Circuit went on to evaluate the justifications advanced by the state in support of its restrictive policy. The court found, first, that the prohibition against write-in voting advanced the state's interest in "political stability" by "ensuring that sore losers do not sidestep the ballot access requirements and by ensuring that voters do not sidestep Hawaii's ban on cross-over voting." 13a. The court of appeals also found that the "prohibition on write-in voting serve[d] [the] interest [in an informed electorate] by ensuring that candidates place themselves on the ballot in time to allow the electorate an ample opportunity to examine the candidate's positions and qualifications." *Id.* Finally, the Ninth Cir-

cuit observed that, under Hawaii law, a candidate who was unopposed after a primary election would be seated without running in the general election and that the prohibition against write-in voting "ensures that a candidate 'seated' after the primary is not challenged in the general election by a write-in candidate." 14a.

In reaching these conclusions, the Ninth Circuit expressly recognized that its decision was inconsistent with that rendered by the Fourth Circuit in *Dixon v. Maryland State Administrative Board of Election Laws*, 878 F.2d 776 (4th Cir. 1989), thereby creating a conflict between the circuits. 14a. The Ninth Circuit decision also placed Hawaii out of step with most other jurisdictions in this country that permit write-in voting, at least in general elections. And it is at odds with the judicial decisions of the highest courts in many of those jurisdictions that have interpreted write-in voting as constitutionally required. *See infra* n.9.

As discussed in Point I below, these conflicts provide a substantial reason for granting *certiorari* review in this case. Review should also be granted because the Ninth Circuit ignored this Court's jurisprudence respecting the constitutional right of electoral participation and seriously misapplied the analysis set forth by this Court in *Anderson v. Celebrezze*, 460 U.S. 780 (1983). Finally, *certiorari* should be granted because this case raises significant practical as well as conceptual questions regarding the nature and scope of the fundamental right of electoral participation, encompassing as it does the correlative rights of political association and expression within the electoral process. Each of these matters will be addressed below.

REASONS FOR GRANTING THE WRIT

I. THE DECISION OF THE NINTH CIRCUIT, UPHOLDING HAWAII'S TOTAL BAN ON WRITE-IN VOTING, IS IN CONFLICT WITH A RECENT RULING OF THE FOURTH CIRCUIT

As the Ninth Circuit plainly acknowledged, its decision in this case is inconsistent with the Fourth Circuit's recent decision in *Dixon v. Maryland State Administrative Board of Election Laws*, 878 F.2d 776. In *Dixon*, the court of appeals invalidated statutory provisions that required persons seeking office in Baltimore, by means of write-in voting, to pay a $150 filing fee in order to have their votes included in the official tally. The Fourth Circuit held that such a requirement impermissibly and unjustifiably diminished constitutional rights of electoral participation and expression. *Id.* at 781.[4]

In reaching this conclusion the Fourth Circuit adopted a far broader and more enduring and realistic conception of the constitutional right of electoral participation than that held by the Ninth Circuit. In essence, the Ninth Circuit regarded the constitutionally protected right to vote as one entailing little more than a right to choose equally with all other citizens among the candidates presented on the ballot. 10a.[5] The Ninth Circuit

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[4] The statute at issue in *Dixon* was not nearly as restrictive of write-in voting as the policy at issue in this case. Nevertheless, the Fourth Circuit found the Maryland law violative of constitutional rights of free expression and voting while the Ninth Circuit, in this case, has upheld a substantially more restrictive policy and rejected the same constitutional claims relied on by the Fourth Circuit. In their reasoning and analysis the Fourth Circuit and Ninth Circuit are in direct conflict.

[5] In this regard, the Ninth Circuit conception of the constitutional right to vote is so constricted that it does not embrace a right to execute a write-in ballot even where only one name appears on the state-prepared ballot. So understood, the Ninth Circuit would not be of-

(continued...)

acknowledged no constitutionally protected interest in using one's vote as a means of political expression or as a means of associating with others to advance a dissenting point of view. Accordingly, the Ninth Circuit concluded that Hawaii's prohibition against write-in voting "does not place any substantial burden on [plaintiff's] fundamental right to participate equally in the election of those who will make or administer the laws." 12a. Adopting a narrow view of the constitutional interests implicated in the exercise of the franchise, the Ninth Circuit seriously undervalued the burden on electoral participation posed by the policy at issue here. The court below then compounded its error by accepting, without serious scrutiny, the proffered justifications advanced by the state in support of its restrictive policy. *See* further discussion, *infra*, Point II.

In contrast, the Fourth Circuit in *Dixon* recognized the important elements of political expression and association that coalesce around electoral campaigns. The Fourth Circuit stressed that the electoral process serves as a vehicle for political expression while, at the same time, it provides a mechanism for selecting representatives. So understood, the Constitution protects the candidate-choosing aspect as well as the political expression component to the casting of a ballot. Moreover, the *Dixon* court further recognized that rights of electoral expression do not become less protected when used to convey dissent or to support a candidate outside the political mainstream:

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[5] (...continued)
fended by the electoral scheme that once prevailed in the Soviet Union where only Communist Party candidates appeared on the ballot and where the voters were told that they could vote for the names appearing on the ballot and for no other candidates. Under the Ninth Circuit's view such a scheme would not violate the U.S. Constitution because all voters had an "equal right" to vote for the candidates appearing on the ballot.

> It is apodictic that a vote does not lose its constitutional significance merely because it is cast for a candidate who has little or no chance of winning. Nor do we think it loses this character if cast for a non-existent or fictional person, for surely the right to vote for the candidate of one's choice includes the right to say that no candidate is acceptable.

Dixon, 878 F.2d at 782. Voters who are dissatisfied with the existing field of candidates may cast votes for write-in candidates, the Fourth Circuit concluded, "in the hope, however slim, that their votes will succeed as efforts to propagate their views and so increase their influence. Our system of government accords the expression of this hope the status of a protected right." *Id.*

The Fourth Circuit's conception of the multifaceted nature of the constitutional right of electoral participation is well supported by decisions of this Court. In *Williams v. Rhodes*, 393 U.S. 23, 31 (1968), this Court made clear that "the right to vote is heavily burdened if that vote may be cast only for one of two parties at a time when other parties are clamoring for a place on the ballot." In essence, *Williams* and its progeny properly recognized that when the state prepares the ballot[6] and, in so doing, restricts the number of names appearing on the ballot, it necessarily limits voters' freedom of choice in a serious way. *Anderson v. Celebrezze*, 460 U.S. at 787; *Illinois State Board of Elections v. Socialist Workers*

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[6] The system of state-prepared ballots, commonly described as the "Australian" ballot system, was only introduced into this country toward the close of the Nineteenth Century. Prior to that time, voters could vote by including any names they wanted on the ballots that they deposited in the ballot box. Reynolds and McCormick, "Outlawing 'Treachery': Split Tickets and Ballot Laws in New York and New Jersey, 1880-1910," 72 The Journal of American History 835, 844 (March 1986).

Party, 440 U.S. 173, 184 (1979).

Moreover, this Court has further recognized that the right to vote and to participate meaningfully in the electoral process extends well beyond the act of choosing among the candidates whose names appear on the ballot. The constitutional right of electoral participation includes the right to associate with like-minded individuals in support of a candidate, to campaign for that candidate and to express one's support for a candidate and for the ideas that that candidate represents. *Anderson v. Celebrezze*, 460 U.S. at 788.

Finally, this Court has observed that the amalgam of interests encompassed within the right of electoral participation also includes using an election campaign as "a means of disseminating ideas as well as attaining political office." *Illinois State Board of Elections v. Socialist Workers Party*, 440 U.S. at 186. And in this regard, the casting of a ballot is not merely a vehicle for registering one's vote for one of the listed candidates, but its most effective use may very well be to register a protest against all of the listed candidates. To the voter unhappy with the choices on the ballot, it is meaningless to cast his or her vote along with thousands of others for "the lesser of two evils." This is especially the case when a write-in vote -- perhaps accompanied by a handful or a large number of others -- will carry a message, loud and clear, that all the candidates on the ballot are unacceptable. As Justice Harlan observed in a concurring opinion in *Williams v. Rhodes*, 393 U.S. at 41: "The right to have one's voice heard and one's views considered by the appropriate governmental authority is at the core of the right of political participation."

Thus, when the names on a election ballot leave many citizens with no opportunity to express strongly held ideological positions, the right of such citizens to cast a meaningful vote is nullified. For a voter's opportunity to cast a ballot has little significance if there is no

candidate standing for his or her interests. For this reason, as well, the Fourth Circuit correctly understood that the constitutional right of electoral participation embraces a right to use the franchise to express one's dissatisfaction with all of the candidates listed on the ballot. And consistent with such an understanding, the *Dixon* court seriously evaluated Baltimore's write-in restrictions, finding that they failed to 'serve[] a compelling governmental interest . . . and [were not] narrowly tailored to serve [any such] interest.'" 878 F.2d at 780, *quoting Eu v. San Francisco County Democratic Central Committee*, 489 U.S. 214, 222 (1989).

Clearly, the two circuits are fundamentally split in their understanding of the nature and extent of the right of electoral participation and of the nature of the scrutiny to be applied to laws restricting this right. Such differences between the circuits render it important for this Court to examine the issue and to clarify the constitutional standards that pertain in controversies such as this.

Moreover, the Ninth Circuit decision in this case is not only inconsistent with that of the Fourth Circuit, it also places Hawaii at odds with practices in most[7] other jurisdictions and it is inconsistent with the constitutional-

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[7] A 1990 note on this case and on *Paul v. Indiana*, 743 F.Supp. 616 (S. D.Ind. 1990), identified three states, in addition to Hawaii, that impose a complete ban on write-in voting. Note, "First Amendment -- Voters' Speech Rights," 104 Harv.L.Rev. 657, 662 n.44 (1990). Those three states are Nevada (Nev. Rev. Stat. §24-293.270(2)(1987)); Oklahoma (Okla Stat. Tit. 26 §7-127(1)(Supp. 1989)); and South Dakota (S.D. Codified Laws Ann. §12-16-1 (1982 & Supp. 1990)).

The note further identified eight states that permit write-in voting in general elections but prohibit such voting in primary elections. *See* 104 Harv.L.Rev. at 662 n.45. And the note identified "at least 16 states [that] require some form of pre-registration by write-in candidates." *See id.* at 663 n.47. The remaining states apparently permit write-in voting in primary as well as general elections without significant limitation.

ly based decisions of the highest courts in many of those jurisdictions.[8] Indeed, there has developed a deep and longstanding tradition among state courts upholding write-in voting.[9] Prior to the Ninth Circuit decision in this case, a smaller body of federal court rulings had also pointed decidedly in favor of a constitutionally protected right to cast a write-in ballot.[10] The decision of the Ninth Circuit conflicts with that tradition. For this reason, as well, review should be granted in this case.

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[8] A few of these state courts -- most notably the Supreme Court of California in *Canaan v. Abdelnour*, 710 P.2d 268 (Cal. 1985) -- have held that the right to cast a write-in ballot is protected by both the federal and state constitutions. A larger number of state courts have relied exclusively on their own state constitutions in upholding write-in voting.

Indeed, shortly after the "Australian" ballot was introduced into this country, a number of state courts reviewed the constitutionality of the new reform. In so doing, such courts typically upheld the "Australian" ballot system only upon the condition that write-in voting was permitted. This development was summarized by the Supreme Judicial Court of Massachusetts in *Cole v. Tucker*, 41 N.E. 681 (Mass. 1985); *see also Jackson v. Norris*, 195 A.576 (Md. 1937); *Snortum v. Homme*, 119 N.W. 59 (Minn. 1909); *Hopper v. Britt*, 96 N.E. 371 (N.Y. 1911).

[9] Many state courts have held that the prohibition against write-in voting contravenes the state constitutions. But, as the California Supreme Court also noted in *Canaan v. Abdelnour*, 710 P.2d at 282 n.22, "courts have construed statutes which were silent on the issue to allow write-in voting to avoid constitutional difficulties" and still others "have expressed in dicta that voters have the right to write-in the candidates of their choice."

[10] In addition to *Dixon*, federal courts conferred constitutional protection on write-in ballots in *Paul v. Indiana*, 743 F.Supp. 616; *Socialist Labor Party v. Rhodes*, 290 F.Supp. 983, 990 (S.D. Ohio), *aff'd in part and modified in part sub nom. Williams v. Rhodes*, 393 U.S. 23 (1968); and in *Grogan v. Graves*, Civ. 90-2378-0 (U.S. Dist. Ct., D.Kans. 1990) (unreported opinion).

Moreover, Congress, by statute, permits citizens living abroad to cast absentee ballots for candidates seeking federal office and, in so doing, to write-in the candidates of their choice. 42 U.S.C. §1973ff-2.

II. THE NINTH CIRCUIT MISCONSTRUED AND MISAPPLIED THE STANDARD SET FORTH BY THIS COURT IN *ANDERSON v. CELEBREZZE*

In *Anderson v. Celebrezze*, 460 U.S. 780, this Court articulated a broad methodology of analysis for dealing with cases involving the constitutional right of electoral participation.[11] Thus, the *Anderson* Court observed that a court called upon to review a statute or policy restricting electoral participation,

> must first consider the character and magnitude of the asserted injury to the rights protected by the First and Fourteenth Amendments that the plaintiff seeks to vindicate. It then must identify and evaluate the precise interests put forward by the State as justifications for the burden imposed by its rule. In passing judgment, the Court must not only determine the legitimacy and strength of each of those interests; it also must consider the extent to which those interests make it necessary to burden the plaintiff's rights. Only after weighing all

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[11] Prior to *Anderson*, this Court had applied a variety of seemingly different analytic standards in reviewing statutes and policies that burdened rights of electoral participation. *Compare, e.g., Dunn v. Blumstein*, 405 U.S. 330 (1972), *with Bullock v. Carter*, 405 U.S. 134 (1972), *with Clements v. Fashing*, 457 U.S. 957 (1982), *and Mandel v. Bradley*, 432 U.S. 173 (1977).

The *Anderson* Court expressed dissatisfaction with "litmus-paper" tests. 480 U.S. at 789. *See also* Justice Stevens' concurring opinion in *Eu v. San Francisco County Democratic Central Committee*, 489 U.S. at 233, and Justice Blackmun's concurring opinion in *Illinois Board of Elections v. Socialist Working Party*, 440 U.S. at 183-85. *See also* Gunther, "Forward: In Search of Evolving Doctrine on a Changing Court: A Model for a Newer Equal Protection," 86 Harv.L.Rev. 1 (1972). Accordingly, in *Anderson*, this Court seemingly attempted to reconcile the disparate analytic approaches and sought to fold them into an all-encompassing methodology of analysis.

> these factors is the reviewing court in a position to decide whether the challenged provision is unconstitutional.

Id. at 789.

But, nothing in this analytic approach suggests that the *Anderson* Court intended to abandon more than two decades of doctrinal development that preceded it. Thus, under the *Anderson* approach, a court called upon to review a law that substantially burdens First Amendment rights of political participation must continue to demand a genuinely close fit between the law in question and the interests the law purports to advance. It must continue to demand that the statute in question be narrowly tailored in the pursuit of compelling governmental interests.[12] This point was made clear in post-*Anderson* cases like *Tashjian v. Republican Party of Connecticut*, 479 U.S. 208 (1986), and *Eu v. San Francisco County Democratic Committee*, 489 U.S. 214. And, even where the magnitude of the asserted constitutional injury does not seem great, the *Anderson* standard requires that where a state restricts political participation it must demonstrate that the restrictions are "necessary" to advance important societal interests -- interests that are real and not simply "theoretically imaginable." *Williams*

[12] This is especially true where, as here, a policy expressly limits the right to vote and the right to express one's views in connection with an electoral contest. Of the variety of ways in which citizens engage in electoral participation, this Court has been most careful to protect the right to vote and the right of political expression against unnecessary limitations by states. Accordingly, this Court has typically imposed the most stringent level of judicial scrutiny upon laws that have substantially abridged the fundamental right to vote. *See Dunn v. Blumstein*, 405 U.S. 330; *Kramer v. Union Free School District*, 395 U.S. 621 (1969); *Carrington v. Rash*, 380 U.S. 89 (1965). Similarly, this Court has strictly scrutinized laws that have been found to burden rights of political expression. *See, e.g., Buckley v. Valeo*, 424 U.S. 1 (1976); and *Eu v. San Francisco County Democratic Central Committee*, 489 U.S. 214.

v. Rhodes, 393 U.S. at 33.

The opinion below purported to apply the analytic method articulated by this Court in *Anderson*. In so doing, however, the Ninth Circuit entirely misconceived and misapplied the *Anderson* standard. As discussed in Point I above, the Ninth Circuit adopted a limited and constricted view of the constitutional right of electoral participation. And its narrow vision of the scope of the constitutional right allowed the court of appeals to conclude erroneously that "the fact that Burdick cannot cast a write-in vote does not place any substantial burden on his fundamental right to participate equally in the election of those who will make or administer the laws." 12a.

The Ninth Circuit compounded its error by casually accepting the state's proferred justification for its policy without ever genuinely asking whether the restriction on write-in voting was "necessary" to guarantee "political stability" or to ensure an "informed electorate" or to protect the "internal structure of [Hawaii's] election laws." 13a-14a. Had the court below seriously examined the state's putative interests, Hawaii's total prohibition of write-in voting could not have been sustained.

Hawaii argues that its write-in ban promotes "political stability" in two ways: first, by preventing "inter-party raiding"; second, by preventing "sore loser" candidacies. But a total prohibition against write-in voting cannot be found necessary to prevent either of these concerns. This is the case with respect to "inter-party raiding" for several reasons. First, "inter-party raiding"[13] is a concern that is limited to primary elections. "Raiding" is never

[13] Inter-party raiding is "the organized switching of blocks of votes from one party to another in order to manipulate the outcome of the other party's primary election." *Anderson*, 460 U.S. at 788, n.9. This Court noted that it is "applicable only to party primaries." *Id.* at 801, n.29.

an issue in general elections. Therefore, Hawaii's total prohibition against write-in voting in general elections as well as in primary elections cannot be justified out of a concern for "inter-party raiding." Second, Hawaii has made clear that it does not regard "raiding" as a serious problem. For Hawaii permits "open" primaries.[14] Where, as here, the state permits any voter to vote in any party's primary election it cannot then turn around and seriously claim that a restriction on write-in voting is "necessary" to prevent "raiding."

Similarly, Hawaii's total prohibition against write-in ballots cannot be justified upon the claim that such a restriction is necessary to prevent candidates who lose primary elections -- so called "sore loser" candidates -- from subsequently running as write-in candidates. Again, there are at least two reasons why this justification must be rejected. First, there is no evidence in the record of any serious effort by "sore losers" to mount a write-in campaign -- and, given the monumental odds against the success of any write-in candidate, it is highly unlikely that any "sore loser" would pursue such a strategy. In this regard, it is axiomatic that hypothesized, unrealistic concerns that are only "theoretically imaginable" cannot serve to justify unnecessary restrictions on the constitutional right of electoral participation. *Williams v. Rhodes*, 393 U.S. at 33. Second, if Hawaii were genuinely concerned about "sore losers" it could draft a prohibition against write-in voting that was narrowly tailored to that concern. It could prohibit the official recording of write-in ballots on behalf of "sore losers."

The claim that Hawaii's prohibition is necessary to ensure an informed electorate is also unpersuasive. For,

[14] In Hawaii's open primary, all registered voters may choose in which party to vote. Haw. Rev. Stat. §12-31. For a description of the different types of "open" and "closed" primaries, *see Tashjian v. Republican Party of Connecticut*, 479 U.S. at 222, n.11.

again, it is unlikely in the extreme that a voter will go to the trouble to execute a write-in ballot for a candidate that he or she knows little or nothing about. Seen in these terms, this justification for Hawaii's prohibition against write-in voting is "highly paternalistic," just as this Court regarded California's ban on primary endorsements by political parties to be paternalistic when the state argued that such a prohibition was necessary to permit voters to make wise decisions unencumbered by the views of political parties. *Eu*, 489 U.S. at 223, 228.

Finally, Hawaii's interest in protecting the "internal structure of its election laws" by protecting primary victors who are running unopposed from being required to mount a campaign and run in the general election cannot serve as a basis for Hawaii's total prohibition against write-in ballots. This is so because Hawaii permits an unopposed primary victor to be automatically designated the victor in the general election only in connection with state legislative contests.[15] Hawaii Const. art. III, §4. This provision does not apply in the vast majority of electoral contests held in Hawaii. Thus, a blanket prohibition against write-in voting that extends beyond this small number of offices where this provision applies cannot be justified as a basis for advancing this interest. The blanket prohibition simply sweeps too broadly.[16]

For all of these reasons, the Ninth Circuit seriously misapplied the *Anderson* model and upheld Hawaii's prohibition against write-in voting upon a casual acceptance of the state's proferred justifications for its restriction. *Certiorari* should be granted to correct the misconstruc-

[15] Section 12-42 of the Hawaii Revised Statutes also permits the automatic designation of primary victors in connection with special elections.

[16] Moreover, petitioner finds highly objectionable the practice of automatically designating an unopposed primary victor as an officeholder without requiring that candidate to run in the general election.

tion and misapplication of this Court's jurisprudence governing the constitutional right of electoral participation.

III. THIS CASE RAISES SIGNIFICANT PRACTICAL AS WELL AS CONCEPTUAL QUESTIONS REGARDING THE NATURE AND SCOPE OF THE FUNDAMENTAL RIGHT OF ELECTORAL PARTICIPATION

As indicated in Point I above, this case raises important conceptual questions regarding the nature of the constitutional right of electoral participation. It raises, as well, the question of whether this Court's voting rights jurisprudence is being properly understood and applied by the lower federal courts. *See* Point II above. In addition to these doctrinal and conceptual issues, however, this case also raises important practical questions for the voter in Hawaii.

Consider the voter who is dissatisfied with the choice of candidates running for statewide office. According to the Ninth Circuit, such a voter could try to organize a campaign around a preferred candidate on the assumption that "Hawaii election laws provide candidates with considerable ease of access to the ballot." 11a. In this regard, the Ninth Circuit observed that,

> [u]nder Hawaii election laws a candidate for county office may gain access to the primary ballot by simply submitting a petition with the signatures of fifteen eligible voters; a candidate for Congress, governor, lieutenant governor, or the board of education may gain access with twenty-five signatures. Haw. Rev. Stat. §12-5 (1990 Supp.). Hawaii's election laws also provide for easy access to the ballot by a party. Haw. Rev. Stat. §11-62 (1988)(signatures of 1% of total registered state voters as of last election).

Id. at n.2.

But, the Ninth's Circuit observations miss the mark in several respects. First, Hawaii is not a state in which independent candidates or minor parties can easily gain access to the general election ballot and thereby present a serious challenge to the political *status quo*. For, even if an independent candidate were to gain access to the primary ballot it will be quite difficult for such a candidate to move from the primary to the general election ballot. The reason for this is that, when a citizen of Hawaii enters the polling site on primary day, that citizen must choose to vote in either the Democratic, Republican or Libertarian primary election or, in the alternative, may choose to vote on a nonpartisan ballot consisting of the names of independent candidates. Haw. Rev. Stat. §12-31. Not surprisingly, very few voters choose the nonpartisan ballot. Nevertheless, Hawaii law requires that, to secure a place on the general election ballot, an independent candidate must obtain more than 10% of the vote cast for that office in the primary election.[17] This requirement serves as a virtually insurmountable impediment to the general election ballot. It is thus apparent that, contrary to the suggestion of the Ninth Circuit, it is quite difficult for an independent candidate to gain access to the general election ballot in Hawaii.

It is similarly difficult for a minor party to gain access to the general election ballot. While the Ninth Circuit correctly noted that Hawaii requires petitions signed by only 1% of the total registered state voters for a new party to gain access to the ballot, the court of appeals ignored the fact Hawaii also requires that these petitions

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[17] A nonpartisan candidate will not be held to this 10% requirement in the unlikely circumstance that he or she attains a vote total that is equal to the vote total for the partisan candidate receiving the lowest number of votes for the same office. Haw. Rev. Stat. §12-41.

be filed 150 days (5 months) prior to the primary election. Haw. Rev. Stat. §11-62. This extraordinarily early filing deadline, again, makes Hawaii a state where access to the general election ballot is not easy.

Moreover, the Ninth Circuit observations regarding Hawaii's ballot access law miss the mark for another reason. For one can easily envision a voter who is dissatisfied with the choices appearing on the ballot who has no time or capacity to organize a campaign around a desired candidate. Such a voter simply wants to say "no" to the candidates listed on the ballot and perhaps to express an alternative preference.

One can well appreciate that a state-prepared ballot contains space for only a limited number of names and so a fair method must be developed for deciding whose name shall appear on the ballot. And, in *Munro v. Socialist Workers Party*, 479 U.S. 189, 194 (1986), this Court recognized that states could limit rights of political participation where such limitations were genuinely necessary to prevent the creation of a ballot that would be confusing to the voter. But concerns about voter confusion cannot explain Hawaii's prohibition against write-in voting. The fact that Hawaii prepares the ballot cannot explain why it would choose, contrary to the practice and tradition in most states, to prohibit citizens from writing-in their own preferences in primary and general elections.

Representative democracy rests upon the "consent of the governed" and this "consent" is, in turn, obtained by permitting the people to choose their political leaders freely and fairly. Alexander Hamilton observed that the essence of representative government is "that the people should choose whom they please to govern them." 2 *Elliot's Debates* 257. In *Williams v. Rhodes*, 393 U.S. at 39, Justice Douglas similarly observed: "I would think that a state has precious little leeway in making it difficult or impossible for citizens to vote for whomever they please

. . . ." And in *Powell v. McCormack*, Chief Justice Warren noted that representative democracy "is undermined as much by limiting whom the people can select as by limiting the franchise itself." 395 U.S. 486, 547 (1969).

Accordingly, our contemporary claim of commitment to democratic government has a hollow ring when election laws are drafted or interpreted in such a way as to deny citizens the widest possible freedom to choose among candidates seeking public office. We similarly dishonor that commitment to democratic values when we interpret our election laws in such a way as to deprive citizens unnecessarily of the right to express their dissatisfaction with all of the candidates appearing on the ballot and when we deny them the right to express their dissent by writing-in the candidates of their own choosing.

CONCLUSION

For the foregoing reasons, the petition for *certiorari* should be granted.

Respectfully submitted,

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Dated: September 25, 1991

APPENDIX

UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

ALAN B. BURDICK,	:	Nos. 90-15873; 90-15876
Plaintiff-Appellee,	:	
v.	:	D.C. No. CV-86-0582-HMF
MORRIS TAKUSHI, Director of Elections, State of Hawaii; JOHN WAIHEE, Lieutenant Governor of Hawaii; BENJAMIN CAYETANO, in his capacity as Lieutenant Governor of the State of Hawaii,	:	
Defendants-Appellants.	:	

ALAN B. BURDICK,	:	No. 90-15877
Plaintiff-Appellee,	:	
v.	:	D.C. No. CV-88-0365-HMF
BENJAMIN CAYETANO, in his capacity as Lieutenant Governor of the State of Hawaii; MORRIS TAKUSKI, Director of Elections of the State of Hawaii,	:	ORDER AND OPINION
Defendants-Appellants.	:	

Appeal from the United States District Court
for the District of Hawaii
Harold M. Fong, District Judge, Presiding

Argued and Submitted
November 5, 1990 - Honolulu, Hawaii

Filed March 1, 1991
Opinion Withdrawn June 28, 1991
Opinion Filed June 28, 1991

Before: Otto R. Skopil, Jr., Robert R. Beezer and Ferdinand F. Fernandez, Circuit Judges.

Opinion by Judge Beezer

SUMMARY

Constitutional Law

Reversing a district court grant of a preliminary injunction ordering Hawaii to provide for the casting and counting of write-in votes, the court of appeals held that Hawaii's failure to provide for write-in voting was not a violation of appellant's right of freedom of expression and association.

The district court ruled that Hawaii's lack of provision for the casting and counting of write-in votes in statewide general elections violated a Hawaii voter's rights under the first and fourteenth amendments. On a previous remand, the district court certified certain questions to the Hawaii Supreme Court. With a definitive ruling from the Hawaii Supreme Court that Hawaii's election laws prohibited write-in voting, Alan B. Burdick renewed his motion for summary judgment in the district court. The district court again ruled that Burdick's federally guaranteed rights of expression and association were impermissibly infringed by Hawaii's prohibition on write-in voting. The State of Hawaii appealed the district court's preliminary injunction directing the State to provide for the casting and counting of write-in votes.

[1] The court stated that the Supreme Court has

recognized that there must be a substantial regulation of elections if they are going to be fair and honest and if some sort of order, rather than chaos, is to accompany the democratic process. [2] However, the rights to cast one's vote effectively and to associate in the advancement of political beliefs are guaranteed by the first and fourteenth amendments, and the state may not burden these rights excessively. [3] Although Burdick is guaranteed an equal voice in the election of those who govern, Burdick did not have an unlimited right to vote for any particular candidate. [4] Because the right to vote is inexorably intertwined with the State's right to regulate the election process, in determining whether prohibition on write-in voting burdened the fundamental right of participating equally in the election of those who govern, the court looked at the Hawaii election law as a whole. [5] The court concluded that although the prohibition on write-in voting may limit Burdick's political speech, it did not restrict the alternative channels available to him for expressing his political views. [6] Similarly, because the prohibition on write-in voting is not based on the content or subject matter of a write-in vote but rather is applicable to all write-in votes, it is a content-neutral, time, place, or manner restriction. [7] Accordingly, Burdick's asserted right to vote for any candidate he chooses did not implicate fundamental constitutional protections.

[8] The prohibition on write-in voting served Hawaii's interest in political stability by ensuring that sore losers do not sidestep the ballot access requirements, and by ensuring that voters do not sidestep Hawaii's ban on cross-over voting. [9] The prohibition also served Hawaii's interest in an informed electorate by ensuring that candidates place themselves on the ballot in time to allow the electorate an ample opportunity to examine the candidates' positions and qualifications. [10] In addition, Hawaii's interest in protecting the integrity of its election process is a compelling interest. The prohibition on write-in voting ensures that a candidate "seated"

after the primary election is not challenged in the general election by a write-in candidate. Therefore, Hawaii's ban on write-in voting did not impermissibly infringe Burdick's constitutional rights of expression and association.

[11] The court declined to follow the Fourth Circuit's contrary conclusion. Hawaii's election laws do not affect the myriad of other avenues that are available for propagating one's views and increasing one's influence. [12] In addition, Burdick did not waive his rights to bring his federal claims before the federal district court, and the district court did not fail to give full faith and credit to the Hawaii Supreme Court's ruling on the certified questions.

COUNSEL

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Mary Blaine Johnson, Wailuku, Hawaii, for the plaintiff-appellee.

James M. Johnson, Senior Assistant Attorney General, Olympia, Washington, for the amicus curiae.

ORDER

The opinion filed on March 1, 1991, and cited at 927 F.2d 469 (9th Cir. 1991) is withdrawn. The attached opinion is ordered filed.

The panel has voted to deny the petition for rehearing and to reject the suggestion for rehearing en banc.

The full court has been advised of the suggestion for rehearing en banc. An active judge has requested a vote on whether to rehear the matter en banc. A vote has

been taken, and has failed to receive a majority of votes in favor of en banc consideration. Fed.R. App.P.35(b).

The petition for rehearing is denied and the suggestion for rehearing en banc is rejected.

OPINION

BEEZER, Circuit Judge:

The district court ruled that Hawaii's lack of provision for the casting and counting of write-in votes in statewide general elections impermissibly infringed a Hawaii voter's rights of expression and association as protected by the first and fourteenth amendments. The district court issued a preliminary injunction ordering Hawaii to provide for the casting and counting of write-in votes and then stayed the injunction pending appeal. We reverse.

I

The facts in this case are undisputed. In June 1986, Alan Burdick notified the Director of Elections and the Lieutenant Governor (hereinafter collectively referred to as the "State"), that he wanted to cast write-in votes in the upcoming primary elections and in future elections. The State advised Burdick that its election laws did not provide for write-in voting and that any write-in votes would be ignored.

Burdick filed suit in federal court, claiming that the lack of provision for write-in voting violated both the Hawaii Constitution and the United States Constitution. The district court held that the failure to provide for write-in voting constituted a violation of Burdick's rights of freedom of expression and association. The court issued a preliminary injunction directing the State to provide for the casting and counting of write-in votes in the November 1986 statewide elections. The State moved

for a stay of the preliminary injunction pending appeal, and the motion was denied.

The State appealed the district court's order and denial of stay, and we granted a stay pending appeal. On May 17, 1988, we reversed and directed the district court to abstain from reaching the federal constitutional issue under the *Pullman* abstention doctrine. *See Burdick v. Takushi*, 846 F.2d 587 (9th Cir. 1988)("[A] definitive resolution of the unsettled question whether Hawaii's election laws actually prohibit write-in voting might obviate the need for a federal court to decide the federal constitutional question . . . .").

On remand, the district court certified the following three questions to the Hawaii Supreme Court:

> (1) Does the Constitution of the State of Hawaii require Hawaii's election officials to permit the casting of write-in votes and require Hawaii's election officials to count and publish write-in votes?
>
> (2) Do Hawaii's election laws require Hawaii's election officials to permit the casting of write-in votes and require Hawaii's election officials to count and publish write-in votes?
>
> (3) Do Hawaii's election laws permit, but not require, Hawaii's election officials to allow voters to cast write-in votes, and to count and publish write-in votes?

On July 21, 1989, the Hawaii Supreme Court answered no to each question. *Burdick v. Takushi*, 70 Haw. 498, 776 P.2d 824, 825 (1989). With a definitive ruling from the Hawaii Supreme Court that Hawaii's election laws prohibited write-in voting, Burdick renewed his motion for summary judgment in the district court. On May 10, 1990, the district court again ruled that Hawaii's prohibition on write-in voting impermissibly infringed Burdick's federally guaranteed rights of expression and

association. The district court again issued a preliminary injunction directing the State to provide for the casting and counting of write-in votes. *See Burdick v. Takushi*, 737 F.Supp. 582 (D. Haw. 1990).

Because a statewide general election was less than four months away, and because this court had granted a stay of the prior preliminary injunction, the district court granted the State's motion to stay the current preliminary injunction pending appeal. *Id.* at 592-593. The State timely appealed the district court's final order.

II

We have jurisdiction pursuant to 28 U.S.C. §1291. A grant of summary judgment is reviewed de novo. *Kruso v. International Telephone & Telegraph Corp.*, 872 F.2d 1416, 1421 (9th Cir. 1989), *cert. denied*, 110 S.Ct. 3217 (1990).

The State asserts that Burdick does not have standing to challenge Hawaii's general election laws. To support its assertion, the State points to the fact that Burdick cannot vote in some of the races affected by the preliminary injunction and the fact that he has failed to identify a particular candidate for whom he wants to cast his write-in vote. To have standing a party must show that:

> "he personally has suffered some actual or threatened injury as a result of the putatively illegal conduct of the defendant," and that the injury "fairly can be traced to the challenged action" and "is likely to be redressed by a favorable decision."

Valley Forge Christian College v. Americans United for Separation of Church & State, Inc., 454 U.S. 464, 472 (1982)(citations omitted).

Burdick has demonstrated that his rights as a voter to freedom of expression and association are threatened

by Hawaii's prohibition on write-in voting. Although an order striking down the prohibition on writ-in voting may apply to races in which Burdick cannot vote, the State does not contend that there is any difference in the way that the prohibition applies to the various elections throughout the state. The prohibition is a general statewide restriction that affects Burdick personally, and therefore he has standing to challenge it. *See Erum v. Cayetano*, 881 F.2d 689, 691 (9th Cir. 1989)(Hawaii voter has standing to challenge the whole of the State election laws creating ballot access restrictions).

III

[1] The Supreme Court has acknowledged that "the Framers of the Constitution intended the States to keep for themselves, as provided in the Tenth Amendment, the power to regulate elections," and that "[e]ach State has the power to prescribe the qualifications of its officers and the manner in which they shall be chosen." *Sugarman v. Dougall*, 413 U.S. 634, 647 (1973)(citations and internal quotation omitted). Furthermore, the Constitution specifically authorizes states to regulate: "The Time, Places and Manner of holding Elections for Senators and Representatives." U.S. Const. art. I, §4, cl. 1. The Supreme Court has also recognized that "as a practical matter, there must be a substantial regulation of elections if they are going to be fair and honest and if some sort of order, rather than chaos, is to accompany the democratic process." *Storer v. Brown*, 415 U.S. 724, 730 (1974).

[2] A state's broad power to prescribe the time, place and manner of elections, however, "does not extinguish the State's responsibility to observe the limits established by the First Amendment rights of the State's citizens." *Tashjian v. Republican Party of Connecticut*, 479 U.S. 208, 217 (1986). The rights to cast one's vote effectively and to associate for the advancement of political beliefs are guaranteed by the first and fourteenth

amendments, and the state may not burden these rights excessively. *See Williams v. Rhodes*, 393 U.S. 23, 30-31 (1968).

The questions presented by a challenge to a specific provision in a state's election laws cannot be resolved by applying a "litmus paper test," *Storer*, 415 U.S. at 730. There is no self-executing rule that is a substitute for the "hard judgments that must be made." *Id.* In *Anderson v. Celebreeze*, 460 U.S. 780, 789 (1983), the Supreme Court set forth an analytical process for making these hard judgments. A court must:

> first consider the character and magnitude of the asserted injury to the rights protected by the First and Fourteenth Amendments that the plaintiff seeks to vindicate. It then must identify and evaluate the precise interests put forward by the State as justifications for the burden imposed by its rule. In passing judgment, the Court must not only determine the legitimacy and strength of each of those interests, it also must consider the extent to which those interests make it necessary to burden the plaintiff's rights. Only after weighing all these factors is the reviewing court in a position to decide whether the challenged provision is unconstitutional.

Id.

We begin the *Anderson* analysis by determining the "character and magnitude" of the injury to Burdick's rights of expression and association. Burdick asserts that the prohibition on write-in voting impinges his right to vote for the candidate of his choice. He asserts that the right to vote for the candidate of one's choice is a fundamental right.

Article I §2 of the United States Constitution grants persons qualified to vote "a constitutional right to vote

and to have their votes counted." *Wesberry v. Sanders*, 376 U.S. 1, 17 (1964). The Supreme Court has stated that:

> No right is more precious in a free country than that of having a voice in the election of those who make the laws under which, as good citizens, we must live. Other rights, even the most basic, are illusory if the right to vote is undermined.

Id.

[3] The fundamental nature of the right to vote is based on a citizen's right to have a voice in the selection of those who govern. Casting one's vote does not implicate fundamental rights in a vacuum. Fundamental rights are implicated as a part of the process through which citizens elect the people who make and administer the laws. Although Burdick is guaranteed an equal voice in the election of those who govern, Burdick does not have an unlimited right to vote for any particular candidate.

For example, Art. I §2 of the United States Constitution limits congressional candidates to persons twenty five and older with seven years citizenship, and Art. II §1 of the United States Constitution limits presidential candidates to natural born citizens thirty-five and older. Moreover, Art. II, §1 of the United States Constitution provides that a vote for the office of the President is for an Elector rather than for an individual presidential candidate. The Supreme Court has upheld numerous state restrictions on who may qualify to run for certain offices. *See e.g., Clements v. Fashing*, 457 U.S. 957 (1982)(incumbent Justice of the Peace denied right to seek election to state legislature, and state and county office holders deemed automatically resigned if they run for another elective office); *Storer*, 415 U.S. 724 (state can require candidate to sever affiliation with political

party one year prior to election in order to run as independent candidate); *American Party of Texas v. White*, 415 U.S. 767, 782 (1974)(state can deny place on ballot to frivolous candidate by requiring candidates to "demonstrate a significant, measurable quantum of community support").

[4] The right to vote is inexorably intertwined with the State's right to regulate the election process. To determine whether the prohibition on write-in voting burdens the fundamental right of participating equally in the election of those who govern, we must look at the Hawaii election laws as a whole.

Hawaii election laws provide candidates with considerable ease of access to the ballot. If Burdick desires to vote for a particular candidate, that candidate need only be qualified for the office being sought[1] and demonstrate a minimal amount of support to be placed on the ballot.[2]

[5] If Burdick desired to vote for a fictional character as a means of making a political statement, he could not get that character's name on the ballot. This restriction may impinge Burdick's political speech, but "ample alternative channels" exists for Burdick to advance his political views. *See Consolidated Edison Co. v. Public Serv. Comm'n*, 447 U.S. 530, 535 (1980). Similarly, the prohibition on write-in voting may limit Burdick's political speech, but it does not restrict the alternative channels available to Burdick for expressing his political

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[1] Haw. Rev. Stat. §12-3 (1988).

[2] Under Hawaii election laws a candidate for county office or the legislature may gain access to the primary ballot by simply submitting a petition with the signatures of fifteen eligible voters; a candidate for Congress, governor, lieutenant governor, or the board of education may gain access with twenty-five signatures. Haw. Rev. Stat. §12-5 (1990 Supp.). Hawaii's election laws also provide for easy access to the ballot by a party. Haw. Rev. Stat. §11-62 (1988)(signatures of 1% of total registered state voters as of last election).

views.

[6] The prohibition on write-in voting is not based on the content or subject matter of a write-in vote but rather is applicable to all write-in votes and, thus, is a content-neutral, time, place, or manner restriction. *See id.* at 536. "A restriction that regulates only the time, place, or manner of speech may be imposed so long as it is reasonable." *Id.*

Hawaii puts few restrictions on a candidate's access to the ballot, and the prohibition on write-in voting places only minimal restrictions on political speech. Accordingly, the fact that Burdick cannot cast a write-in vote does not place any substantial burden on his fundamental right to participate equally in the election of those who will make or administer the laws.[3]

[7] The fact that a voter may want to say that no candidate is acceptable does not mean that he has a fundamental right to say that on the ballot. Although the voter has a protected right to voice his opinion and attempt to influence others, he has no guarantee that he can voice any particular opinion through the ballot-box. Accordingly, Burdick's asserted right to vote for *any* candidate he chooses does not implicate fundamental constitutional protections.

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[3] The Supreme Court has not faced the question whether a person's interest in casting a write-in vote is a fundamental right. Rather, the Court has provided conflicting messages concerning the role write-in voting plays in the election process. *Compare Storer*, 415 U.S. at 736 n.7 (resort to write-in alternative provided by California law was adequate substitute for independent candidate who did not qualify for general election ballot) *with Anderson*, 460 U.S. at 799 n.26 (write-in vote is not an adequate substitute for having a candidate's name appear on the ballot in presidential election) and *Lubin v. Panish*, 415 U.S. 709, 719 n.5 (1974)("The realities of the electoral process . . . strongly suggest that 'access' via write-in votes falls far short of access in terms of having the name of the candidate on the ballot.").

The second step in the *Anderson* analysis is the identification and evaluation of the "precise interests put forth by the State as justifications for the burden imposed by its rule." *Anderson*, 460 U.S. at 789. The State advances three interests in support of its election laws: political stability, voter education, and protecting the internal structure of the State's election laws.

A. Political Stability

[8] Hawaii asserts that it has a legitimate interest in protecting against "sore loser" candidacies and party raiding.[4] The Supreme Court has acknowledged that States have a compelling interest in ensuring that unrestrained factionalism does not damage the election process. *See Munro v. Socialist Workers Party*, 479 U.S. 189, 196 (1986). The prohibition on write-in voting serves that interest by ensuring that sore losers do not sidestep the ballot access requirements and by ensuring that voters do not sidestep Hawaii's ban on cross-over voting.

B. Informed Electorate

[9] Hawaii also asserts that it has an interest in protecting the election process from late blooming candidates. The Supreme Court has acknowledged that the State's interest in fostering an informed and educated electorate is a legitimate interest. *See Anderson*, 460 U.S. at 796. The prohibition on write-in voting serves that interest by ensuring that candidates place themselves on the ballot in time to allow the electorate an ample opportunity to examine the candidates' positions

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[4] Limitations on sore loser candidacies deny a candidate a spot on the general election ballot if the candidate loses in the primary. *Anderson*, 460 U.S. at 784 n.2; *Storer*, 415 U.S. at 735. Party raiding occurs where "voters in sympathy with one party designate themselves as voters of another party so as to influence or determine the results of the other party's primary." *Rosario v. Rockefeller*, 410 U.S. 752, 760 (1973).

and qualifications.

C. Internal Structure of Election Laws

[10] The final interest advanced by Hawaii is its interest in protecting the primary mandate. A State's interest in protecting the integrity of its election process is a compelling interest. *Eu v. San Francisco City Democratic Central Comm.*, 489 U.S. 214, 226 (1989). Hawaii election law provides for the automatic seating of a candidate who is unopposed in a primary. Haw. Rev. Stat. §12-41 (1988). The prohibition on write-in voting ensures that a candidate "seated" after the primary is not challenged in the general election by a write-in candidate.

Under the *Anderson* analysis, therefore, Hawaii's ban on write-in voting does not impermissibly infringe Burdick's constitutional rights of expression and association. *Anderson* does not require a showing of compelling state interest or narrowly tailored laws. It requires that the State's interests justify the burden placed on the plaintiff's constitutional rights.

Hawaii's election laws eliminate frivolous candidacies while still providing access to candidates who have a relatively minor modicum of support. Although the prohibition on write-in voting places some restrictions on Burdick's rights of expression and association, that burden is justified in light of the ease of access to Hawaii's ballots, the alternatives available to Burdick for expressing his political beliefs, the State's broad powers to regulate elections, and the specific interests advanced by the State.

IV

We are not unmindful of the fact that the Fourth Circuit has reached a different conclusion in *Dixon v. Maryland State Administrative Bd. of Election Laws*, 878 F.2d 776 (4th Cir. 1989). In *Dixon*, the Fourth Circuit

held that the casting and counting of write-in votes implicates fundamental rights. *Id.* at 782. The state election law at issue in Dixon required candidates for certain city offices to pay a $150 filing fee in order to qualify as an "official" write-in candidate. Only official write-in candidates could attain office and have the votes cast for them publicly reported. In determining that the casting and counting of write-in votes implicated fundamental rights, the Dixon court stated that:

> It is apodictic that a vote does not lose its constitutional significance merely because it is cast for a candidate who has little or no chance of winning. Nor do we think it loses this character if cast for a non-existent or fictional person, for surely the right to vote for the candidate of one's choice includes the right to say that no candidate is acceptable. The Supreme Court has repeatedly recognized that minor parties and their supporters seek "influence, if not always electoral success."

Id. (citations omitted).

The Dixon court further reasoned that in many cases write-in voters cast their ballots "in the hope, however slim, that their votes will succeed as efforts to propagate their views and so increase their influence." *Id.* The *Dixon* court concluded that the expression of this hope is a constitutionally protected right. *Id.*

[11] We decline to follow the Fourth Circuit's lead. Dixon fails to differentiate between a person's right to participate equally in the election of those who govern and a person's right to try to influence the election process. Although a person's hope that he will be able to propagate his views and increase his ability to influence the outcome of an election may be a constitutionally protected right, a prohibition on write-in voting does not substantially burden that hope. Hawaii's election laws

do not affect the myriad of other avenues that are available for propagating one's views and increasing one's influence.

V

The final issue raised by the State is whether the district court failed to give full faith and credit to the Hawaii Supreme Court's ruling in *Burdick v. Takushi*, 70 Haw. 498, 776 P.2d 824 (1989). In Burdick, the Hawaii Supreme Court held that Hawaii election laws does not provide for or allow the casting of write-in votes. 776 P.2d at 825-826.

The State asserts that because Hawaii's constitution "tracks almost exactly" the federal constitution, and because Burdick did not limit his arguments before the Hawaii Supreme Court to the textually distinct provisions of Hawaii law, Burdick elected to seek a comprehensive and final adjudication of his rights in the state court. According to the State, Burdick was required to reserve his federal arguments explicitly when the district court certified the three questions on Hawaii state law to the Hawaii Supreme Court. *See England v. Louisiana State Bd. of Medical Examiners*, 375 U.S. 411, 417-422 (1964). We disagree.

[12] The parties stipulated that the questions should be certified to the Hawaii Supreme Court, and the district court ordered that the certification take place. The district court specifically explained to the Hawaii Supreme Court that jurisdiction over the federal questions presented by Burdick's suit remained at the district court:

> Should the Hawaii Supreme Court's decision require the district court to again address the federal constitutional question, the court, absent an intervening change of federal law, will issue a ruling consistent with its previous determinations. Thus, the Hawaii Supreme Court's decision will be determinative of this action.

Burdick did not waive his rights to bring his federal claims before the federal district court, and the district court did not fail to give full faith and credit to the Hawaii Supreme Court's ruling on the certified questions.

VI

We conclude that Hawaii's prohibition on write-in voting serves legitimate state interests and is a part of a comprehensive election scheme that provides Burdick with adequate opportunities and alternatives to exercise his rights of expression and association. The prohibition on write-in voting, therefore, does not create an impermissible burden on Burdick's first and fourteenth amendment rights when compared with the asserted interests of the State.

REVERSED.

UNITED STATES COURT OF APPEALS
NINTH CIRCUIT

ALAN B. BURDICK,
Plaintiff-Appellee,

v.

MORRIS TAKUSHI, Director of Elections, State of Hawaii; JOHN WAIHEE, Lieutenant Governor of Hawaii; BENJAMIN CAYETANO, in his Capacity as Lieutenant Governor of the State of Hawaii,
Defendants-Appellants.

ALAN B. BURDICK,
Plaintiff-Appellee,

v.

BENJAMIN CAYETANO, in his Capacity as Lieutenant Governor of the State of Hawaii; MORRIS TAKUSHI, Director of Elections of the State of Hawaii,
Defendants-Appellants.

Nos. 90-15873, 90-15876 and 15877.

UNITED STATES COURT OF APPEALS, NINTH CIRCUIT

Argued and Submitted Nov. 5, 1990.

Decided March 1, 1991.

Steven S. Michaels, Deputy Atty. Gen., Honolulu, Hawaii, for defendants-appellants.

Mary Blaine Johnston, Wailuku, Hawaii, for plaintiff-appellee.

James M. Johnson, Sr., Asst. Atty. Gen., Olympia, Wash., for amicus curiae.

Appeal from the United States District Court for the District of Hawaii.

Before SKOPIL, BEEZER and FERNANDEZ, Circuit Judges.

BEEZER, Circuit Judge:

The district court ruled that Hawaii's lack of provision for the casting and counting of write-in votes in statewide general elections impermissibly infringed a Hawaii voter's rights of expression and association as protected by the first and fourteenth amendments. The district court issued a preliminary injunction ordering Hawaii to provide for the casting and counting of write-in votes and then stayed the injunction pending appeal. We reverse.

I

The facts in this case are undisputed. In June 1986, Alan Burdick notified the Director of Elections and the Lieutenant Governor (hereinafter collectively referred to as the "State"), that he wanted to cast write-in votes in the upcoming primary elections and in future elections. The State advised Burdick that its election laws did not provide for write-in voting and that any write-in votes would be ignored.

Burdick filed suit in federal court, claiming that the lack of provision for write-in voting violated both the Hawaii Constitution and the United States Constitution. The district court held that the failure to provide for write-in voting constituted a violation of Burdick's rights of freedom of expression and association. The court issued a preliminary injunction directing the State to provide for the casting and counting of write-in votes in November 1986 statewide elections. The State moved for a stay of the preliminary injunction pending appeal, and the motion was denied.

The State appealed the district court's order and denial of stay, and we granted a stay pending appeal. On May 17, 1988, we reversed and directed the district court to abstain from reaching the federal constitutional issue under the *Pullman* abstention doctrine. *See*, *Burdick v. Takushi*, 846 F.2d 587 (9th Cir. 1988)("[A] definitive resolution of the unsettled question whether Hawaii's election laws actually prohibit write-in voting might obviate the need for a federal court to decide the federal constitutional question . . . .").

On remand, the district court certified the following three questions to the Hawaii Supreme Court:

(1) Does the Constitution of the State of Hawaii require Hawaii's election officials to permit the casting of write-in votes and require Hawaii's election officials to count and publish write-in votes?

(2) Do Hawaii's election laws require Hawaii's election officials to permit the casting of write-in votes and require Hawaii's election officials to count and publish write-in votes?

(3) Do Hawaii's election laws permit but not require, Hawaii's election officials to allow voters to cast write-in votes, and to count and publish write-in votes?

On July 21, 1989, the Hawaii Supreme Court answered no to each question. *Burdick v. Takushi*, 70 Haw. 498, 776 P.2d 824, 825 (1989). With a definitive ruling from the Hawaii Supreme Court that Hawaii's election laws prohibited write-in voting, Burdick renewed his motion for summary judgment in the district court. On May 10, 1990, the district court again ruled that Hawaii's prohibition on write-in voting impermissibly infringed Burdick's federally guaranteed rights of expression and association. The district court again issued a preliminary injunction directing the State to provide for the casting and counting of write-in votes. *See Burdick v. Takushi*,

737 F.Supp. 582 (D. Haw. 1990).

Because a statewide general election was less than four months away, and because this court had granted a stay of the prior preliminary injunction, the district court granted the State's motion to stay the current preliminary injunction pending appeal. *Id.* at 592-593. The State timely appealed the district court's final order.

II

We have jurisdiction pursuant to 28 U.S.C. §1291. A grant of summary judgment is reviewed de novo. *Kruso v. International Telephone & Telegraph Corp.*, 872 F.2d 1416, 1421 (9th Cir. 1989), *cert. denied*, ___ U.S. ___, 110 S.Ct. 3217, 110 L.Ed.2d 664 (1990).

[1] The State asserts that Burdick does not have standing to challenge Hawaii's general election laws. To support its assertion, the State points to the fact that Burdick cannot vote in some of the races affected by the preliminary injunction and the fact that he has failed to identify a particular candidate for whom he wants to cast his write-in vote. To have standing a party must show that:

> "he personally has suffered some actual or threatened injury as a result of the putatively illegal conduct of the defendant," and that the injury "fairly can be traced to the challenged action" and "is likely to be redressed by a favorable decision."

Valley Forge Christian College v. Americans United for Separation of Church & State, Inc., 454 U.S. 464, 472, 102 S.Ct. 752, 758, 70 L.Ed.2d 700 (1982)(citations omitted).

Burdick has demonstrated that his rights as a voter to freedom of expression and association are threatened by Hawaii's prohibition on write-in voting. Although an order striking down the prohibition on write-in voting may apply to races in which Burdick cannot vote, the

State does not contend that there is any difference in the way that the prohibition applies to the various elections throughout the state. The prohibition is a general statewide restriction that affects Burdick personally, and therefore he has standing to challenge it. *See Erum v. Cayetano*, 881 F.2d 689, 691 (9th Cir. 1989)(Hawaii voter has standing to challenge the whole of the State election laws creating ballot access restrictions).

III

The Supreme Court has acknowledged that "the Framers of the Constitution intended the State to keep for themselves, as provided in the Tenth Amendment, the power to regulate elections," and that "[e]ach State has the power to prescribe the qualifications of its officers and the manner in which they shall be chosen." *Sugarman v. Dougall*, 413 U.S. 634, 647, 93 S.Ct. 2842, 2850, 37 L.Ed.2d 853 (1973)(citations and internal quotation omitted). Furthermore, the Constitution specifically authorizes states to regulate: "The Times, Places and Manner of holding Elections for Senators and Representatives." U.S. Const. art. I, §4, cl. 1. The Supreme Court has also recognized that "as a practical matter, there must be a substantial regulation of elections if they are going to be fair and honest and if some sort of order, rather than chaos, is to accompany the democratic process." *Storer v. Brown*, 415 U.S. 724, 730, 94 S.Ct. 1274, 1279, 39 L.Ed.2d 714 (1974).

A state's broad powers to prescribe the time, place and manner of elections, however, "does not extinguish the State's responsibility to observe the limits established by the First Amendment rights of the State's citizens." *Tashjian v. Republican Party of Connecticut*, 479 U.S. 208, 217, 107 S.Ct. 544, 550, 93 L.ed.2d 514 (1986). The rights to cast one's vote effectively and to associate for the advancement of political beliefs are guaranteed by the first and fourteenth amendments, and the state may not burden these rights excessively. *See Williams v.*

Rhodes, 393 U.S. 23, 30-31, 89 S.Ct. 5, 10, 21 L.Ed.2d 24 (1968).

The questions presented by a challenge to a specific provision in a state's election laws cannot be resolved by applying a "litmus paper test." *Storer*, 451 U.S. at 730, 94 S.Ct. at 1279. There is no self-executing rule that is a substitute for the "hard judgments that must be made." *Id.* In *Anderson v. Celebrezze*, 460 U.S. 780, 789, 103 S. Ct. 1564, 1570, 75 L.Ed.2d 547 (1983), the Supreme Court set forth an analytical process for making these hard judgments. A court must:

> first consider the character and magnitude of the asserted injury to the rights protected by the First and Fourteenth Amendments that the plaintiff seeks to vindicate. It then must identify and evaluate the precise interests put forward by the State as justifications for the burden imposed by its rule. In passing judgment, the Court must not only determine the legitimacy and strength of each of those interests, it also must consider the extent to which those interests make it necessary to burden the plaintiff's rights. Only after weighing all these factors is the reviewing court in a position to decide whether the challenged provision is unconstitutional.

Id.

We begin the *Anderson* analysis by determining the "character and magnitude" of the injury to Burdick's rights of expression and association. Burdick asserts that the prohibition on write-in voting impinges his right to vote for the candidate of his choice. He asserts that the right to vote for the candidate of one's choice is a fundamental right.

Article I, §2 of the United States Constitution grants persons qualified to vote "a constitutional right to vote

and to have their votes counted." *Wesberry v. Sanders*, 376 U.S. 1, 17, 84 S.Ct. 526, 535, 11 L.Ed.2d 481 (1964). The Supreme Court has stated that:

> No right is more precious in a free country than that of having a voice in the election of those who make the laws under which, as good citizens, we must live. Other rights, even the most basic, are illusory if the right to vote is undermined.

Id.

[2] The fundamental nature of the right to vote is based on a citizen's right to have a voice in the selection of those who govern. Casting one's vote does not implicate fundamental rights in a vacuum. Fundamental rights are implicated as a part of the process through which citizens elect the people who make and administer the laws. Burdick does not have a fundamental right to vote for any particular candidate; he is simply guaranteed an equal voice in the election of those who govern.

For example, Art. I, §2 of the United States Constitution limits congressional candidates to persons twenty-five and older with seven years citizenship, and Art. II, §1 of the United States Constitution limits presidential candidates to natural born citizens thirty-five and older. Moreover, Art. II, §1 of the United States Constitution provides that a vote for the office of the President is for an Elector rather than for an individual presidential candidate. The Supreme Court has upheld numerous state restrictions on who may qualify to run for certain offices. *See, e.g., Clements v. Fashing*, 457 U.S. 957, 102 S.Ct. 2836, 73 L.Ed.2d 508 (1982)(incumbent Justice of the Peace denied right to seek election to state legislature, and state and county office holders deemed automatically resigned if they run for another elective office); *Storer*, 415 U.S. 724, 94 S.Ct. 1274 (state can require candidate to sever affiliation with political party one year prior to

election in order to run as independent candidate); *American Party of Texas v. White*, 415 U.S. 767, 782, 94 S.Ct. 1296, 1306, 39 L.Ed.2d 744 (1974)(state can deny place on ballot to frivolous candidate by requiring candidates to "demonstrate a significant, measurable quantum of community support").

[3] The right to vote is inexorably intertwined with the State's right to regulate the election process. To determine whether the prohibition on write-in voting burdens the fundamental right of participating equally in the election of those who govern, we must look at the Hawaii election laws as a whole.

Hawaii election laws provide candidates with considerable ease of access to the ballot. If Burdick desires to vote for a particular candidate, that candidate need only be qualified for the office being sought[1] and demonstrate a minimal amount of support to be placed on the ballot.[2]

If Burdick desired to vote for a fictional character as a means of making a political statement, he could not get that character's name on the ballot. This restriction may impinge Burdick's political speech, but "ample alternative channels" exist for Burdick to advance his political views. *See Consolidated Edison Co. v. Public Serv. Comm'n*, 447 U.S. 530, 535, 100 S.Ct. 2326, 2332, 65 L.Ed.2d 319 (1980).

[4] The prohibition on write-in voting is not based

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[1] Haw. Rev. Stat. §12-3 (1988).

[2] Under Hawaii election laws a candidate for county office or the legislature may gain access to the primary ballot by simply submitting a petition with the signatures of fifteen eligible voters; a candidate for Congress, governor, lieutenant governor, or the board of education may gain access with twenty-five signatures. Haw. Rev. Stat. §12-5 (1990 Supp.). Hawaii's election laws also provide for easy access to the ballot by a party. Haw. Rev. Stat. §11-62 (1988)(signatures of 1% of total registered state voters as of last election).

on the content or subject matter of a write-in vote but rather is applicable to all write-in votes and, thus, is a content-neutral, time, place, or manner restriction. *See id.* at 536, 100 S.Ct. 2332. "A restriction that regulates only the time, place, or manner of speech may be imposed so long as it is reasonable." *Id.*

[5] Hawaii puts few restrictions on a candidate's access to the ballot, and the prohibition on write-in voting places only minimal restrictions on political speech. Accordingly, the fact that Burdick cannot cast a write-in vote does not place any substantial burden on his fundamental right to participate equally in the election of those who will make or administer the laws.[3]

[6] The fact that a voter may want to say that no candidate is acceptable does not mean that he has a fundamental right to say that on the ballot. Although the voter has a protected right to voice his opinion and attempt to influence others, he has no guarantee that he can voice any particular opinion through the ballot-box. Accordingly, Burdick's asserted right to vote for *any* candidate he chooses does not implicate fundamental constitutional protections.

[7] The second step in the *Anderson* analysis is the

[3] The Supreme Court has not faced the question whether a person's interest in casting a write-in vote is a fundamental right. Rather, the Court has provided conflicting messages concerning the role write-in voting plays in the election process. Compare *Storer*, 415 U.S. at 736 n.7, 94 S.Ct. at 1282 n.7 (resort to write-in alternative provided by California law was adequate substitute for independent candidate who did not qualify for general election ballot) with *Anderson*, 460 U.S. at 799 n.26, 103 S.Ct. at 1575 n.6 (write-in vote is not an adequate substitute for having a candidate's name appear on the ballot in presidential election) and *Lubin v. Panish*, 415 U.S. 709, 719 n. 5, 94 S.Ct. 1315, 1321, 39 L.Ed.2d 702 (1974)("The realities of the electoral process . . . strongly suggest that 'access' via write-in votes falls far short of access in terms of having the name of the candidate on the ballot").

identification and evaluation of the "precise interests put forth by the State as justifications for the burden imposed by its rule." *Anderson*, 460 U.S. at 789, 103 S.Ct. at 1570. The State advances three interests in support of its election laws: political stability, voter education, and protecting the internal structure of the State's election laws.

A. *Political Stability*

Hawaii asserts that is has a legitimate interest in protecting against "sore loser" candidacies and party raiding.[4] The Supreme Court has acknowledged that States have a compelling interest in ensuring that unrestrained factionalism does not damage the election process. *See Munro v. Socialist Workers Party*, 479 U.S. 189, 196, 107 S.Ct. 533, 538, 93 L.Ed.2d 499 (1986). The prohibition on write-in voting serves that interest by ensuring that sore losers do not sidestep the ballot access requirements and by ensuring that voters do not sidestep Hawaii's ban on cross-over voting.

B. *Informed Electorate*

Hawaii also asserts that it has an interest in protecting the election process from late blooming candidates. The Supreme Court has acknowledged that the State's interest in fostering an informed and educated electorate is a legitimate interest. *See Anderson*, 460 U.S. at 796, 103 S.Ct. at 1574. The prohibition on write-in voting serves that interest by ensuring that candidates place themselves on the ballot in time to allow the electorate

[4] Limitations on sore loser candidacies deny a candidate a spot on the general election ballot if the candidate loses in the primary. *Anderson*, 460 U.S. at 784, 103 S.Ct. at 1567; *Storer*, 415 U.S. at 735, 94 S.Ct. at 1281. Party raiding occurs where "voters in sympathy with one party designate themselves as voters of another party so as to influence or determine the results of the other party's primary." *Rosario v. Rockefeller*, 410 U.S. 752, 760, 93 S.Ct. 1245, 1251, 36 L.Ed.2d 1 (1973).

an ample opportunity to examine the candidate's positions and qualifications.

C. *Internal Structure of Election Laws*

The final interest advanced by Hawaii is its interest in protecting the primary mandate. A State's interest in protecting the integrity of its election process is a compelling interest. *Eu v. San Francisco City Democratic Central Comm.*, 489 U.S. 214, 226, 109 S.Ct. 1013, 1018, 103 L.Ed.2d 271 (1989). Hawaii election law provides for the automatic seating of a candidate who is unopposed in a primary. Haw. Rev. Stat. §12-41 (1988). The prohibition on write-in voting ensures that a candidate "seated" after the primary is not challenged in the general election by a write-in candidate.

Under the *Anderson* analysis, therefore, Hawaii's ban on write-in voting does not impermissibly infringe Burdick's constitutional rights of expression and association. *Anderson* does not require a showing of compelling state interests or narrowly tailored laws. It requires that the State's interests justify the burden placed on the plaintiff's constitutional rights.

Hawaii's prohibition on write-in voting eliminates frivolous candidacies while still providing access to candidates who have a relatively minor modicum of support. Although the prohibition on write-in voting places some restrictions on Burdick's rights of expression and association, that burden is justified in light of the case of access to Hawaii's ballots, the alternatives available to Burdick for expressing his political beliefs, the State's broad powers to regulate elections, and the specific interests advanced by the State.

IV

We are not unmindful of the fact that the Fourth Circuit has reached a different conclusion in *Dixon v. Maryland State Administrative Bd. of Election Laws*, 878

F.2d 776 (4th Cir. 1989). In *Dixon*, the Fourth Circuit held that the casting and counting of write-in votes implicates fundamental rights. *Id.* at 782. The state election law at issue in *Dixon* required candidates for certain city offices to pay at $150 filing fee in order to qualify as an "official" write-in candidate. Only official write-in candidates could attain office and have the votes cast for them publicly reported. In determining that the casting and counting of write-in votes implicated fundamental rights, the *Dixon* court stated that:

> It is apodictic that a vote does not lose its constitutional significance merely because it is cast for a candidate who has little or no chance of winning. Nor do we think it loses this character if cast for a non-existent or fictional person, for surely the right to vote for the candidate of one's choice includes the right to say that no candidate is acceptable. The Supreme Court has repeatedly recognized that minor parties and their supporters seek "influence, if not always electoral success."

Id. (citations omitted).

The *Dixon* court further reasoned that in many cases write-in voters cast their ballots "in the hope, however slim, that their votes will succeed as efforts to propagate their views and so increase their influence." *Id.* The *Dixon* court concluded that the expression of this hope is a constitutionally protected right. *Id.*

We decline to follow the Fourth Circuit's lead. *Dixon* fails to differentiate between a person's right to participate equally in the election of those who govern and a person's right to try to influence the election process. Although a person's hope that he will be able to propagate his views and increase his ability to influence the outcome of an election may be a constitutionally

protected right, a prohibition on write-in voting does not substantially burden that hope. Hawaii's election laws do not affect the myriad of other avenues that are available for propagating one's views and increasing one's influence.

V

[8] The final issue raised by the State is whether the district court failed to give full faith and credit to the Hawaii Supreme Court's ruling in *Burdick v. Takushi*, 70 Haw. 498, 776 P.2d 824 (1989). In *Burdick*, the Hawaii Supreme Court held that Hawaii election law does not provide for or allow the casting of write-in votes. 776 P.2d at 825-826.

The State asserts that because Hawaii's constitution "tracks almost exactly" the federal constitution, and because Burdick did not limit his arguments before the Hawaii Supreme Court to the textually distinct provisions of Hawaii law, Burdick elected to seek a comprehensive and final adjudication of his rights in the state court. According to the State, Burdick was required to reserve his federal arguments explicitly when the district court certified the three questions on Hawaii state law to the Hawaii Supreme Court. *See England v. Louisiana State Bd. of Medical Examiners*, 375 U.S. 411, 417-422, 84 S.Ct. 461, 465-68, 11 L.Ed.2d 440 (1964). We disagree.

The parties stipulated that the questions should be certified to the Hawaii Supreme Court, and the district court ordered that the certification take place. The district court specifically explained to the Hawaii Supreme Court that jurisdiction over the federal questions presented by Burdick's suit remained at the district court:

> Should the Hawaii Supreme Court's decision require the district court to again address the federal constitutional question, the court, absent an intervening change of federal law, will issue a ruling consistent with its previous determination. Thus, the Hawaii Supreme Court's decision will be determinative of this action.

Burdick did not waive his rights to bring his federal claims before the federal district court, and the district court did not fail to give full faith and credit to the Hawaii Supreme Court's ruling on the certified questions.

VI

We conclude that Hawaii's prohibition on write-in voting serves legitimate state interests and is a part of a comprehensive election scheme that provides Burdick with adequate opportunities and alternatives to exercise his rights of expression and association. The prohibition on write-in voting, therefore, does not create an impermissible burden on Burdick's first and fourteenth amendment rights when compared with the asserted interests of the State.

REVERSED.

IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF HAWAII

ALAN B. BURDICK,	)	Civil No. 86-0582 HMF
Plaintiff,	)	
v.	)	
MORRIS TAKUSHI, Director of Elections, State of Hawaii; JOHN WAIHEE, Lieutenant Governor, State of Hawaii,	)	
Defendants.	)	

ALAN B. BURDICK,	)	Civil No. 88-0365 HMF
Plaintiff,	)	
v.	)	
BENJAMIN CAYETANO, in his individual capacity as Lieutenant Governor of the State of Hawaii; MORRIS TAKUSKI, Director of Elections of the State of Hawaii,	)	
Defendants.	)	

ORDER GRANTING PLAINTIFF'S MOTION FOR SUMMARY JUDGMENT AND PERMANENT INJUNCTIVE RELIEF; DENYING DEFENDANTS' COUNTER-MOTION FOR SUMMARY JUDGMENT; AND GRANTING DEFENDANTS' CONDITIONAL COUNTER-MOTION FOR STAY

INTRODUCTION

On May 7, 1990, the court heard oral argument on plaintiff's motion for summary judgment and permanent injunctive relief and defendants' counter-motion for summary judgment and conditional counter-motion for stay.

BACKGROUND

In June 1986, plaintiff Alan B. Burdick notified defendants, the Director of Elections and the Lieutenant Governor (who serves as the Chief Elections Officer), that he wished to cast one or more write-in votes in the September 1986 primary elections and in future elections. After consulting with the Attorney General's office, defendants advised plaintiff that Hawaii election laws did not provide for write-in voting and that such votes would be disallowed or ignored.

Burdick filed suit in federal district court, claiming that Hawaii's ban on write-in voting violated both the Hawaii Constitution and the United States Constitution. This court agreed, granting plaintiff's motion for summary judgment on the ground that the refusal to permit write-in voting violated plaintiff's constitutionally guaranteed freedoms of expression and association. This court then issued an injunction ordering defendants to provide for the casting and counting of write-in votes in the 1986 general election. Defendants moved for a stay of this court's 1986 injunction which this court denied on October 8, 1986.

Defendants appealed this court's September 29, 1986 order to the Ninth Circuit Court of Appeals, and obtained a stay of the order pending appeal. On May 17, 1988,[1] the appellate court issued a decision vacating this

[1] Coincidentally, knowing the length of time it might take the Ninth Circuit to adjudicate defendants' appeal and unaware that the Ninth Circuit opinion's would be issued the same day, plaintiff Burdick filed (continued...)

court's order on the ground that this court should have abstained from ruling on the federal constitutional issue. The appellate court found that *Pullman* abstention was proper in this case since the question whether Hawaii's statutes or constitution required or permitted write-in voting was an undecided question of state law, and a definitive resolution of this question might have obviated the need to decide the federal constitutional question. *Burdick v. Takushi*, 846 F.2d 587 (9th Cir. 1988), citing *Railroad Commission v. Pullman*, 312 U.S. 496 (1941).

Following the Ninth Circuit's decision, the following questions were certified to the Hawaii Supreme Court:

(1) Does the Constitution of the State of Hawaii require Hawaii's election officials to permit the casting of write-in votes and require Hawaii's election officials to count and publish write-in votes?

(2) Do Hawaii's election laws require Hawaii's election officials to permit the casting of write-in votes and require Hawaii's election officials to count and publish write-in votes?

(3) Do Hawaii's election laws permit, but not require, Hawaii's election officials to allow voters to cast write-in votes, and to count and publish write-in votes?

On July 21, 1989, the Hawaii Supreme Court entered a ruling, answering "No" to each of the three questions presented. The court found that Hawaii's statutory election scheme precluded write-in balloting and found this ban on write-in voting permissible under the Hawaii state constitution. *Burdick v. Takushi*, 70 Haw. 498 (1989).

Now that the Hawaii Supreme Court has found that

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[1] (...continued)
a new action (*Burdick v. Cayetano*, Civil No. 88-0365) on May 17, 1988. The two action were later consolidated.

Hawaii's statutory election scheme prohibits write-in voting, the federal constitutional issue which this court decided three-and-a-half years ago is again before this court. Specifically, this court must decide whether Hawaii's ban on write-in voting violates the First and Fourteenth Amendments as to the United States Constitution.

SUMMARY JUDGMENT STANDARD

Rule 56(c) of the Federal Rules of Civil Procedure provides that summary judgment shall be entered when:

> . . . the pleadings, depositions, answers to interrogatories, and admissions on file, together with the affidavits, if any, show that there is no genuine issue as to any material fact and that the moving party is entitled to a judgment as a matter of law.

The moving party has the initial burden of "identifying for the court those portions of the materials on file that it believes demonstrate the absence of any genuine issue of material fact." *T.W. Elec. Serv., Inc. v. Pacific Elec. Contractors Ass'n*, 809 F.2d 626, 630 (9th Cir. 1987), *citing Celotex Corp. v. Catrett*, 477 U.S. 317, 323, 106 S.Ct. 2548, 2553 (1986). The movant must be able to show "the absence of a material and triable issue of fact," *Richards v. Neilsen Freight Lines*, 810 F.2d 898, 902 (9th Cir. 1987), although it need not necessarily advance affidavits or similar materials to negate the existence of an issue on which the non-moving party will bear the burden of proof at trial. Celotex, 477 U.S. at 323, 106 S. Ct. at 2553. *But cf., id.*, 477 U.S. at 328, 106 S.Ct. at 2555-56 (White, J., concurring).

If the moving party meets its burden, then the opposing party may not defeat a motion for summary judgment in the absence of any significant probative evidence tending to support his legal theory. *Commodity Futures Trading Comm'n v. Savage*, 611 F.2d 270, 282 (9th Cir.

1979). The opposing party cannot stand on his pleadings, nor can he simply assert that he will be able to discredit the movant's evidence at trial. *See T.W. Elec.*, 809 F.2d at 630. Similarly, legal memoranda and oral argument are not evidence and do not create issues of fact capable of defeating an otherwise valid motion for summary judgment. *British Airways Bd. v. Boeing Co.*, 585 F.2d 946, 952 (9th Cir. 1978), *cert. denied*, 440 U.S. 981 (1979). Moreover, "if the factual context makes the non-moving party's claim *implausible*, that party must come forward with more persuasive evidence that would otherwise be necessary to show that there is a genuine issue for trial." *Franciscan Ceramics*, 818 F.2d at 1468, *citing Matsushita Elec. Indus. Co., Ltd. v. Zenith Radio Corp.*, 475 U.S. 574, 587, 106 S.Ct. 1348, 1356 (1986).

The standard for a grant of summary judgment reflects the standard governing the grant of a directed verdict. *See Eisenberg v. Insurance Co. of North America*, 815 F.2d 1285, 1289 (9th Cir. 1987), *citing Anderson v. Liberty Lobby*, Inc., 477 U.S. 242, 250, 106 S.Ct. 2505, 2512 (1986). Thus, the question is whether "reasonable minds could differ as to the import of the evidence." *Id.*

However, when "direct evidence" produced by the moving party conflicts with "direct evidence" produced by the party opposing summary judgment, "the judge must assume the truth of the evidence set forth by the non-moving party with respect to the fact." *T.W. Elec.*, 809 F.2d at 631. Also, inference from the facts must be drawn in the light most favorable to the non-moving party. *Id.* Inferences may be drawn both from underlying facts that are not in dispute, as well as from disputed facts which the judge is required to resolve in favor of the non-moving party. *Id.*

DISCUSSION

The facts of this case are simple and undisputed. Since both parties are asking this court to grant summary

judgment in their favor, they agree that no material issue of fact is in dispute and that the court need only concern itself with the disputed issue law: constitutionality of Hawaii's ban on write-in voting.

Plaintiff argues that Hawaii's ban on write-in voting violates his and all other voters' free speech rights guaranteed by the U.S. Constitution. Defendants argue that the burden on plaintiff's constitutional rights is impermissible because compelling state interests are served by the ban on write-in voting.

Initially, the court must determine the appropriate standard of review by which it will adjudge the validity of the challenged prohibition. "Constitutional challenges to specific provisions of a State's election laws . . . cannot be resolved by any 'litmus-paper test' that will separate valid from invalid restrictions." *Anderson v. Celebreeze*, 460 U.S. 780, 789, 103 S.Ct. 1564, 1570 (1983). Such challenges usually are governed by a balancing test. Under this balancing test,

> . . . a court must first consider the character and magnitude of the asserted injury to the rights protected by the First and Fourteenth Amendments that the plaintiff seeks to vindicate. It then must identify and evaluate the precise interests put forward by the State as justifications for the burden imposed by its rule. In passing judgment the Court must not only determine the legitimacy and strength of each of those interests; it also must consider the extent to which those interests make it necessary to burden the plaintiff's rights. Only after weighing all these factors is the reviewing court in a position to decide whether the challenged provision is unconstitutional.

Id. at 789 (citations omitted). *See also Erum v. Caye-*

tano, 881 F.2d 689 (9th Cir. 1989); *Dixon v. Maryland State Administrative Board of Election Laws*, 878 F.2d 776 (4th Cir. 1989); *Rainbow Coalition of Oklahoma v. Oklahoma State Election Board*, 844 F.2d 740 (10th Cir. 1988).

Recently, the United States Supreme Court applied a strict scrutiny standard of review in assessing the constitutionality of state election law. *Eu v. San Francisco County Democratic Central Committee*, 109 S.Ct. 1013 (1989). The Court held:

> To assess the constitutionality of a state election law, we first examine whether it burdens rights protected by the First and Fourteenth Amendments. If the challenged law burdens the rights of political parties and their members, *it can survive constitutional scrutiny only if the State shows that it advances a compelling state interest, and is narrowly tailored to serve that interest.*

Id. at 1019-20. *See also McLain v. Meier*, 851 F.2d 1045 (8th Cir. 1988)(apply strict scrutiny standard of review).

This court applied the *Anderson* balancing test when it evaluated plaintiff's constitutional challenge three-and-a-half years ago. Since *Anderson* still appears to be the applicable standard in the Ninth Circuit, this court again will utilize the *Anderson* balancing analysis today. *Erum v. Cayetano*, 881 F.2d 689 (9th Cir. 1989). However, the court will also bear in mind the fact that recent Supreme Court authority suggests a stricter standard of review may be appropriate. *Eu v. San Francisco County Democratic Central Committee*, 109 S.Ct. 1013 (1989).

I. Character and Magnitude of Injury to Plaintiff's First and Fourteenth Amendment Rights

The right to vote for the candidate of one's choice is a fundamental right. "No right is more precious in a

free country than that of having a voice in the election of those who make the laws under which, as good citizens, we live. Other rights, even the most basic, are illusory if the right to vote is undermined." *Williams v. Rhodes*, 393 U.S. 23, 31 (1968).

Indeed, "[t]he right to vote freely for the candidate of one's choice is [] the essence of a democratic society, and any restrictions on that right strike at the heart of representative government." *Socialist Labor Party v. Rhodes*, 290 F.Supp. 983, 987 (S.D. Ohio 1968). "Rights relating to the franchise implicate the First Amendment 'with its guarantee that an individual be allowed to participate in the most general communicative processes that determine the contours of our social and political thought.'" *Canaan v. Abdelnour*, 221 Cal. Rptr. 468, 473-74 (1985), citing Tribe, *American Constitutional Law* at 737.

The electoral process is the process by which voters select candidates to fill representative political offices. The State may not unduly burden the freedom of choice which a voter exercises in the voting booth. If a citizen has the right to vote, a right which is guaranteed by the U.S. Constitution, then he should be allowed to vote for any candidate of his choice, subject to reasonable conditions and qualifications imposed by the State. *See Socialist Party v. Rhodes*, 290 F.Supp. 983 (S.D. Ohio 1968).

Hawaii's absolute ban on write-in voting also affects the rights of association and political expression of both voters and potential candidates. *Canaan v. Abdelnour*, 221 Cal. Rptr. 468, 473 (1985). It is a well-established tenet that "speech concerning public affairs is more than self-expression; it is the essence of self government." *Id.* at 479. Being able to vote for the candidate of one's choice, even when that candidate is not one of the listed candidates on the ballot, is the type of significant political expression which the First Amendment was designed to protect. Similarly, the First Amendment protects the

right to freely participate in the electoral process. Political participation should not be limited to those who adhere to the ideals and goals of the major political parties, but should include all citizens who wish to publicly demonstrate support for a certain candidate or political theory. *Socialist Party v. Rhodes*, *supra* at 987.

A ban on write-in voting directly burdens the voter's right to freely vote for the candidate of his choice by completely precluding that voter's choice. This burden is of a significant magnitude given the importance of the right impaired.

There has been some suggestion that the right to be a candidate for political office, in and of itself, may not be a fundamental right. *Dixon v. Maryland State Administrative Election Laws*, 878 F.2d 776, 779 (4th Cir. 1989). This court recognizes that "not all restrictions imposed by the States on candidates' eligibility . . . impose constitutionally suspect burdens on voters' rights to associate or to choose among candidates." *Anderson v. Celebrezze*, 460 U.S. at 78. However, this court is not being asked to decide the constitutionality of an election statute restricting a candidate's access to the ballot or the candidate's right to have the State print his name on the ballot. This court must decide the constitutionality of Hawaii's prohibition on a voter's right to vote for the candidate of his choosing, even if that candidate is not one of the candidates on the printed ballot.

This court realizes that "the rights of voters and the rights of candidates do not lend themselves to neat separation; laws that affect candidates always have at least some theoretical, correlative effect on voters." *Canaan v. Abdelnour*, 221 Cal. Rptr. 468, 474 (1985). Nevertheless, the court is not as greatly concerned with the *candidate*'s right to run for political office as it is with *the voter*'s right to vote for the candidate of his choice, associate with the candidate of his choosing, and exercise freedom of political expression. Therefore, even though

the right to be a candidate for political office in and of itself may not be a fundamental constitutional right, this right, in conjunction with the deprivation of freedom of expression and the right to vote, two established fundamental rights, amounts to an enormous injury to plaintiff's First and Fourteenth Amendment rights. Accordingly, this court finds that the character and magnitude of the alleged burden on plaintiff's constitutional rights is significantly great.

II. The Interests Which the State Has Presented as Justifications for the Burden on Plaintiff's Constitutional Rights

The State has presented three main interests which it asserts are sufficiently compelling to justify the enormous burden on plaintiff's constitutional rights. These are: (1) the interest in avoiding factionalism or confining intra-party feuds, (2) the interest in fostering an informed electorate, and (3) the interest in protecting the primary mandate.

The first interest which the State advances is the State's interest in confining intra-party feuds. The State argues that the ban on write-in voting is necessary to limit the problems that arise when a defeated party candidate carries an intra-party feud into the general election campaign. The State fears that a "sore loser" who failed at the nomination or primary stage would be able to wage a new campaign if write-in voting were allowed. Prohibiting write-in voting at the general election stage, according to the State, ensures that the primary election "is not merely an exercise or warm-up for the general election but an integral part of the election process." *Storer v. Brown*, 415 U.S. 724, 735 (1974). Such a ban allegedly enables the State of reserve the general election for major struggles. *Id.* at 734.

In *Storer v. Brown*, *supra*, the United States Supreme Court decided the constitutionality of a California statute

forbidding an independent candidate from a place on the ballot if he was affiliated with a political party within one year prior to the preceding primary election. In that context, the Court defended the California electoral process and its disaffiliation requirement. The Court, however, did not address the issue of the constitutionality of a ban on write-in voting.

The interest in avoiding unrestrained factionalism has been recognized as a compelling interest in at least two ballot-access cases. *Storer v. Brown*, 415 U.S. 724 (1974); *Erum v. Cayetano*, 881 F.2d 689 (9th Cir. 1989). An interest can be a compelling interest in certain circumstances, yet fail to rise to that level of compellingness in other sets of circumstances. *See Eu v. San Francisco County Democratic Central Committee*, 109 S.Ct. 1013 (1989)(recognizing that the state's interests in a stable government and protecting voters from confusion were compelling or at least legitimate interests, but finding these interests insufficient to justify California's ban on primary endorsements by political parties); *Democratic Party of United States v. Wisconsin*, 450 U.S. 107 (1981)(holding that Wisconsin's asserted compelling interests in preserving the integrity of the election process, providing secrecy of the ballot, increasing voter participation in primaries, and preventing harassment of voters did not justify the State's substantial intrusion into the associational freedom of members of a minor party). This is particularly true in the present case.

The State cites several cases to demonstrate that the interests it asserts as justifications for the ban on write-in voting are compelling and necessary, but none of the cases it relies upon ever squarely addressed the issue of write-in voting that this court faces. *See, e.g., Munro v. Socialist Workers Party*, 479 U.S. 189 (1986)(deciding constitutionality of Washington statute requiring a minor-party candidate to receive at least 1% of all votes cast for an office in a primary election before his name could

be placed on the general election ballot); *Erum v. Cayetano*, 881 F.2d 689 (9th Cir. 1989)(deciding constitutionality of Hawaii statute requiring non-partisan candidates, in order to have their names printed on the general election ballot, to receive 10% of the votes cast in the primary election or at least as many votes as the least favored, successful partisan candidate); *McLain v. Meir*, 851 F.2d 1045 (8th Cir. 1988)[2](deciding constitutionality of North Dakota statute requiring third party candidates to collect 7,000 signatures 55 days before the primary election and independent candidates to collect 1,000 signatures 55 days before the general election in order to be placed on the ballot); *Rainbow Coalition of Oklahoma v. Oklahoma State Election Board*, 844 F.2d 740 (10th Cir. 1988)(deciding constitutionality of Oklahoma statute requiring the filing of a petition with 5% of the total votes cast in the last gubernatorial or presidential election to create a new party); *Hall v. Simcox*, 766 F.2d 1171 (7th Cir. 1985)(deciding constitutionality of Indiana statute requiring minor parties wishing to be listed on the ballot to submit petitions with 2% of the number of persons who voted in the preceding election).

In *Eu v. San Francisco County Democratic Central Committee*, 109 S.Ct. 1013 (1989), the United States Supreme Court examined a provision of the California Election Code which banned primary endorsements by political parties and imposed restrictions on the internal governance of political parties. One of the State's arguments in support of its electoral scheme was that a party

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[2] The *McLain* court did not address the question whether a ban on write-in voting violated the plaintiff's rights on the ground that the federal district court lacked federal jurisdiction to hear this claim. The *McLain* court's reasoning is difficult to understand. When a voter challenges a ban on write-in voting as violative of his First and Fourteenth Amendment rights under the U.S. Constitution, it appears that the claim "arises under" a federal question by virtue of the fact that the plaintiff is alleging the violation of the U.S. Constitution.

that issues primary endorsements risks intra-party friction which might endanger the party's general election prospects. *Id.* at 1022. The Court, however, held:

> [E]ven if a ban on endorsements saves a political party from pursuing self-destructive acts, that would not justify a State substituting its judgment for that of the party. *Because preserving party unity during a primary is not a compelling state interest, we must look elsewhere to justify the challenged law.*

Id. at 1022-23 (citations omitted). *See also Anderson v. Celebrezze*, 460 U.S. 780 (1983)(holding that the State's asserted interest in political stability amounts to a desire to protect existing political parties from competition generated by independent candidates who have previously been affiliated with a party, an interest that conflicts with First Amendment values).

In this case, the State's asserted interest in avoiding intra-party factionalism is not compelling under the present circumstances because it amounts to a desire to quash any possible competition generated by a candidate who does not have a place on the printed ballot, but who may garner support as a write-in candidate. This strikes at the very heart of our democratic processes and our country's long history of self-governance. The State should not paternalistically substitute its judgment as to what the voters want for the voters' own judgment. If even one voter wishes to dissent from the voice of the majority by writing in the name of a candidate not available on the printed ballot, this court believes that is his right to do so.

The second interest advanced by the State is the interest in fostering an informed electorate. This interest includes not only the interest in having an electorate which is fully informed about who is seeking office and

what that candidate stands for, *Gebelein v. Nashold*, 406 A.2d 279, 281 (Del. Ch. 1979)[3], but also the interest in protecting the integrity of the political process from frivolous or fraudulent candidacies. *McLain v. Meier*, 851 F.2d 1045, 1051 (8th Cir. 1988).

The State certainly has a legitimate interest in fostering an informed electorate. *Eu v. San Francisco County Democratic Central Committee*, 109 S.Ct. 1013, 1023 (1989). However, this interest may not always be considered sufficiently weighty to justify a burden on constitutional rights. *Id.* at 1023. "Moreover, as a matter of practical politics, the electoral process contains its own cure for voters' ignorance about a particular candidate. Unknown candidates simply do not win large numbers of votes. A key goal of every political campaign is to promote the candidate's name identification among the electorate." *Anderson v. Celebrezze*, 460 U.S. 780, 189-90 n.25 (1983).

Similarly, although the State's interest in protecting the electoral process from frivolous or fraudulent candidacies may be legitimate and even compelling in certain

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[3] The Court of Chancery of Delaware in *Gebelein* never resolved the issue of whether the Town's refusal to permit write-in ballots at the annual municipal election was unconstitutional. The court merely recognized the interests of both the voters and the municipality, stating:

> The officials of Frederica and similar small municipalities therefore have the difficult task of attempting to balance two competing interests. The first is the right of voters to express their displeasure at those who are serving as town officials. One way to express this disapproval is for them to write in names on a ballot . . . The second interest is the right of the electorate to be fully informed as to whom is seeking office and what they stand for. There is no easy answer to this dilemma and since the issue is not now properly before me, a definitive answer must await another day.

circumstances, it is not always recognized as such. The Court of Appeals for the Fourth Circuit encountered this predicament in *Dixon v. Maryland State Administrative Board of Election Laws*, 878 F.2d 776 (4th Cir. 1989). In that case, the court was asked to decide the constitutionality of Maryland's requirement that write-in candidates for public office pay a filing fee of $150. The court found this statute unconstitutionally interfered with voters' right to elect candidates of their choice. One of the state's asserted interests was denying official recognition to fraudulent and frivolous candidates to minimize voter confusion and preserve the integrity of the political process. The court recognized this interest as indisputably a legitimate and weighty one in some circumstances. The court explained:

> In cases involving candidates seeking positions on ballots, for example, the Supreme Court has acknowledged that weeding out spurious candidates for these reasons is a valid objective. In our view, *this concern does not weigh as heavily where according official status to write-in candidates in advance of election day is concerned.* In this context, where the voters have time to study the candidates to gauge their seriousness prior to the actual balloting, it would seem that room is available for a broader range of candidates representing a wider spectrum of interests.

Id. at 784 (citations omitted).

In this case, a complete ban on write-in voting does not serve a compelling interest in avoiding fraudulent or frivolous candidacies. Whatever spurious and frivolous candidates the ban on write-in voting weeds out, it also stifles what may be serious, legitimate candidacy. *Canaan v. Abdelnour*, 221 Cal. Rptr. 468, 478 (1985). Moreover, it appears that write-in voting is allowed in

most other states.[4] It is unlikely that so many state legislatures would provide for write-in voting if the dangers of frivolous candidacies and uninformed voters were really a significant problem. *Id.* at 479.

Finally, the state's asserted interest in protecting the primary mandate includes its interest in finality and protecting the integrity of the election process. The State argues that under the current automatic-seating provision, a primary winner who faces no opposition can be seated automatically. If the State were required to count write-in votes, this might result in a candidate who would have been seated automatically under the present electoral scheme, being forced to continue to spend time and money campaigning even though he otherwise would have won.

The State certainly has a legitimate interest in protecting the integrity of its election process. *Eu v. San Francisco County Democratic Central Committee*, 109 S. Ct. 1013, 1024 (1989). Nonetheless, it is against the notion of representative government for the State of deprive voters of the right to vote for the candidate of their choice to protect the primary winner from having to spend time and money campaigning. The essence of our system of self-government is the marketplace of ideas. "Discussion of public issues and debate on the qualifications of candidates are integral to the operation of the system of government established by our Constitution. The First Amendment affords the broadest protection to such political expression in order 'to assure [the] unfettered interchange of ideas for the bringing about of political and social changes desired by the people.' . . . This no more than reflects our 'profound national commitment to the principle that debate on public issues

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[4] Plaintiff claims that 48 states allow some form of write-in voting. The State recognizes that at least twenty states provide for limited write-in voting. *See* Defendant's Reply Memorandum at 6.

should be uninhibited, robust, and wide-open.'" *Federal Election Comm'n v. Natural Conserv. Pol. Action*, 470 U.S. 480, 493, 105 S.Ct. 1459, 1466 (1985), citing *Buckley v. Valeo*, 424 U.S. 1, 14 (1976).

If a write-in candidate can command so much attention that he poses a threat to an otherwise automatically-seated primary winner, then it is worth the extra time and money for the electorate to be exposed to increased debate and public discussion. It is often the unpopular view of minor or non-party candidates which become the views of the mainstream by virtue of being expressed.

A balancing of the rights of the voters against the interests asserted by the State leads this court to the conclusion that Hawaii's prohibition on write-in voting is unconstitutional. The absolute ban on write-in voting burdens the right to freely vote for the candidate of one's choice, and implicates the rights of free expression and association. None of the interests the State has asserted is sufficiently weighty to justify this enormous burden on plaintiff's constitutional rights. Therefore, applying the *Anderson* balancing analysis, this court holds that Hawaii's ban on write-in voting impermissibly infringes on plaintiff's First and Fourteenth Amendment rights.

The State raises several peripheral arguments in its counter-motion for summary judgment outside the scope of the applicable balancing analysis. The State argues that this Court's ruling in 1986 that Hawaii's ban on write-in voting is contrary to now settled law. As noted above, none of the cases cited by the State addressed the constitutionality of a state ban on write-in voting. *See supra* at 13-14. And, although the courts in those cases may have found the asserted state interests sufficiently compelling to justify restrictions in ballot access, none of those decisions addressed the issue this court faces today - that of the constitutionality of a complete ban on write-

in voting.

The State also argues that by prohibiting write-in voting while offering easy access to the ballot, Hawaii does no more than what other states do by regulating write-in voting. There is a major difference, however, between the states that limit write-in voting and Hawaii. Those states that limit write-in voting *allow* at least some form of write-in voting, while Hawaii completely prohibits any form of write-in voting.

The State argues that a ban on write-in voting is merely a time, place and manner restriction on speech. The State's argument is misplaced. The court recognizes that the State has broad power to regulate the time, place and manner of its elections. This broad power, however, does not eliminate the State's responsibility to observe the limits established by the First Amendment. *Eu v. San Francisco County Democratic Central Committee*, 109 S.Ct. 1013, 1019 (1989). Additionally, the ban on write-in voting is not merely a restriction on speech. It constitutes a total ban on the right to vote for the candidate of one's choice if that candidate is not listed on the ballot.

The State argues that if it must tolerate plaintiff's speech, which it characterizes as "spoiling" the ballot with a write-in vote, then it should not have to count and publish the vote. "A right to 'express [one's] feelings' without legal effect, however, is antithetical to the fundamental nature of the right to vote." *Canaan v. Abdelnour*, 221 Cal. Rptr. 468, 476-77 (1985). As this court stated in its order of September 29, 1986, "Of course, it goes virtually without saying that the ability to cast a write-in vote includes a right to have that vote considered. To afford a voter the opportunity to write in the name of his candidate, and then to ignore that vote, is to offer a hollow right indeed." Order Granting Motion for Summary Judgment and for Permanent Injunction at 11. The State should be required to count any

write-in votes cast.

The State argues that plaintiff has waived his right to argue the federal constitutional issue before this court, and that the Hawaii Supreme Court's decision in *Burdick v. Takushi*, 70 Haw. 498 (1989) has res judicata or collateral estoppel effect on this court. Defendants' arguments are completely without merit. The Hawaii Supreme Court did not decide the federal constitutional issue which is before this court today. The Hawaii Supreme Court merely decided that neither the Hawaii Constitution nor its statutory framework requires or permits Hawaii election officials to allow voters to cast write-in votes and to count and publish write-in votes.

Similarly, the Court of Appeals for the Ninth Circuit did not decide the federal constitutional question before this court today. The Ninth Circuit vacated this court's judgment on the ground that this court should have abstained from deciding the merits of plaintiff's constitutional challenge because it was not clear whether Hawaii's election laws prohibited write-in voting. It did not reach the merits of the federal constitutional issue.

Even if defendants raised arguments regarding the federal constitutional issue in their briefs before the Ninth Circuit Court of Appeals and the Hawaii Supreme Court, since these courts did not address the merits of the federal constitutional issue, this court fails to see how such action by *defendants* constitutes a waiver of *plaintiff*'s right to argue the federal constitutional issue before this court, especially in light of the fact that this court retained jurisdiction over the federal constitutional question when it certified the questions to the Hawaii Supreme Court.

None of the State's additional arguments are persuasive upon this court. This court holds that Hawaii's absolute ban on write-in voting impermissibly infringes on plaintiff's federal constitutional rights and that no com-

pelling state interests exist to justify this intrusion. Accordingly, the court GRANTS plaintiff's motion for summary judgment and for permanent injunctive relief.

III. Stay Pending Appeal

The State has asked this court to stay the injunction pending appeal to the Court of Appeals for the Ninth Circuit. In light of the fact that it is unlikely that the Ninth Circuit will adjudicate this matter within the four months between the date of filing of this court's order and the primary election is September, this court recognizes the hardship and injury defendants will suffer if forced to provide for and count write-in ballots on this year's primary and general elections before a final resolution of this issue has been rendered by the appellate court. This court is also aware that a prior appellate panel of the Ninth Circuit reversed this Court's previous order denying defendants' motion for a stay, and it appears likely that the appellate court will follow the course of least resistance and take such action again if this court denies defendants' motion for stay. Without any diminution in the strength of this court's opinion regarding the merits of its position, and the court's belief that plaintiff continues to suffer enormous deprivation of his constitutional rights from Hawaii's absolute ban on write-in voting, this court is constrained to reluctantly GRANT defendants' conditional counter-motion for stay with the admonition that the parties pursue an expeditious appeal of this case.

IT IS SO ORDERED

DATED: Honolulu, Hawaii, May 10, 1990

/s/
HAROLD M. FONG
United States District Judge

SUPREME COURT OF HAWAII
July 21, 1989
No. 13157

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ALAN B. BURDICK,)
)
Plaintiff-Appellant,)
)
v.)
)
MORRIS TAKUSHI, Director)
of Elections, State of Hawaii;)
JOHN WAIHEE, Lieutenant)
Governor, State of Hawaii,)
)
Defendants-Appellees.)
)
----------x

Mary Blaine Johnston, Wailuku, Maui, for plaintiff-appellant.

Steven S. Michaels, Dept. of the Atty. Gen., (Charlene M. Aina, with him, on the brief), Deputies Atty., Honolulu, for defendants-appellees.

Before LUM, C.J., and NAKAMURA, PADGETT, HAYASHI and WAKATSUKI, JJ.

PADGETT, Justice.

Three questions have been certified to us by the United States District Court for the District of Hawaii. The questions and our answers are as follows.

(1) Does the Constitution of the State Hawaii require Hawaii's election officials to permit the casting of write-in votes and require Hawaii's election officials to

count and publish write-in votes?

Answer. No.

(2) Do Hawaii's election laws require Hawaii's election officials to permit the casting of write-in votes and require Hawaii's election officials to count and publish write-in votes?

Answer. No.

(3) Do Hawaii's election laws permit, but not require, Hawaii's election officials to allow voters to cast write-in votes, and to count and publish write-in votes?

Answer. No.

HRS §16-1 provides:

> The chief election officer may adopt, experiment with, or abandon any voting system authorized under this chapter or to be authorized by the legislature. These systems shall include, but not be limited to voting machines, paper ballots, and electronic voting systems. All voting systems approved by the chief election officer under this chapter are authorized for use in all elections for voting, registering, and counting votes cast at the election.
>
> Voting systems of different kinds may, at the discretion of the chief election officer, be adopted for different precincts within the same district. The chief election officer may provide for the experimental use at any election, in or more precincts, of a voting system without a formal adoption thereof and its use at the election shall be as valid for all purposes as if it had been permanently adopted; provided that if a voting machine is used experimentally under this paragraph it need not meet the requirements of section 16-12.

HRS §16-22 provides:

> The method of marking a paper ballot shall be prescribed by the chief election officer by rules and regulations promulgated in accordance with chapter 91. The chief election officer shall prescribe a uniform method of marking the ballots in all precincts in a county and for absentee voting by paper ballot.

These provisions seemingly might permit the chief elections officer to allow write-in votes pursuant to regulations, or on an experimental basis if such voting did not conflict with other statutes, but our review of the present election statutes leads us to the conclusion that such a conflict exists.

With respect to general and special general elections, HRS §12-1 provides:

> All candidates for elective office, except as provided in section 14-21, shall be *nominated* in accordance with this chapter

(Underscoring supplied.)

HRS §12-2 provides in part:

> No person shall be a candidate for any general or special general election unless the person has been nominated in the immediately preceding primary or special primary.

Write-in votes therefore cannot be cast or counted and published in such general or special general elections.

HRS Chapter 12 governs primary elections. That chapter does not expressly forbid write-in votes at primary elections.

Hawaii's election laws provide for easy access to the ballot by new, or minority parties, and by nonpartisan candidates. However, they do require that the nomination process be followed, and they do attempt to make

the process of casting and counting ballots an orderly one, where the opportunities for fraud are minimized.

HRS §12-22 provides that:

> There shall be only one primary or special primary ballot containing the names of all nonpartisan candidates to be voted for and the offices for which they are candidates. The ballot shall be clearly designated as the nonpartisan primary or special primary ballot and shall conform in all other respects to the requirements relative to official party ballots.

This section requires the nonpartisan ballot at the primary to contain the names of all nonpartisan candidates. A write-in candidate would not be on the ballot and thus write-in votes are not possible in this statutory framework.

IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF HAWAII

ALAN B. BURDICK, Plaintiff, vs. MORRIS TAKUSHI, Director of Elections, State of Hawaii, JOHN WAIHEE, Lieutenant Governor, State of Hawaii, Defendants.	)	Civil No. 86-0582

ORDER CERTIFYING QUESTIONS OF HAWAII LAW TO THE SUPREME COURT OF THE STATE OF HAWAII

The parties to this case have submitted a stipulation requesting the United States District Court for the District of Hawaii to certify certain questions to the Supreme Court of the State of Hawaii. The court finds good cause to certify these questions and being fully informed of the premises therefor.

IT IS HEREBY ORDERED that the Clerk of the United States District Court for the District of Hawaii shall forthwith cause the filing of the appropriate certificate, a copy of which is attached hereto as Exhibit 1, submitting the following questions to the Supreme Court of the State of Hawaii;

(1) Does the Constitution of the State of Hawaii require Hawaii's election officials to permit the casting of write-in votes and require Hawaii's election officials to count and publish write-in votes?

(2) Do Hawaii's election laws require Hawaii's election officials to permit the casting of write-in votes and require Hawaii's election officials to count and publish write-in votes?

(3) Do Hawaii's election laws permit, but not require, Hawaii's election officials to allow voters to cast write-in votes, and to count and publish write-in votes?

Dated: Honolulu, Hawaii, July 19, 1988

/s/
HAROLD M. FONG
United States District Judge

IN THE SUPREME COURT
OF THE STATE OF HAWAII

ALAN B. BURDICK, Plaintiff, vs. MORRIS TAKUSHI, Director of Elections, State of Hawaii, JOHN WAIHEE, Lieutenant Governor, State of Hawaii, Defendants.	)	AMENDED CERTIFICATION FROM THE UNITED STATES DISTRICT COURT FOR THE DISTRICT OF HAWAII (USDC NO. 86-0582 HMF)

AMENDED CERTIFICATION FROM THE UNITED STATES DISTRICT COURT FOR THE DISTRICT OF HAWAII TO THE SUPREME COURT OF THE STATE OF HAWAII

I. INTRODUCTION

The United States District Court for the District of Hawaii has before it in the case entitled *Burdick v. Takushi, et al.*, Civil No. 86-0582, questions regarding the United States Constitution, the Hawaii Constitution and election laws of the State of Hawaii. The questions regarding the Hawaii Constitution and the Hawaii election laws are determinative of the action and there is no clear precedent controlling these questions in the decisions of the courts of the State of Hawaii. Pursuant to Hawaii Rule of Appellate Procedure 13, this court respectfully requests that the Hawaii Supreme Court answer the questions as set forth in Part II of this certification by written opinion.

II. STATEMENT OF PRIOR PROCEEDINGS AND STATEMENT OF FACTS

In May 1986 plaintiff Burdick notified defendants Takushi and Waihee that he wished to cast one or more write-in votes in the September 1986 primary election and in future elections. After consulting with the State Attorney General, defendants informed Burdick that Hawaii election laws do not provide for write-ins and that such votes would be disallowed or ignored.

Burdick filed suit in federal district court claiming that in the upcoming primary election and in future primary and general elections he wished to vote for persons whose names may not or would not appear on the printed ballot and that a ban on such write-in voting violates both the Hawaii Constitution and the United States Constitution. The district court agreed, granting summary judgment for Burdick on the federal constitutional issue. The district court issued an injunction ordering the defendants to provide for write-in voting in the 1986 general election.

The defendants appealed the district court's decision to the United States Court of Appeals for the Ninth Circuit. The defendants obtained a stay pending appeal.

The appeal was argued before the court of appeals on August 13, 1986. On May 17, 1988, the appellate court entered its opinion vacating the district court's judgment. The court of appeals remanded the case to the district court with instructions to the district court to abstain from deciding the federal constitutional issue pending a determination by the courts of the State of Hawaii whether Hawaii's law permits or requires write-in voting.

If the Hawaii Supreme Court rules that Hawaii law requires write-in voting or in the absence of such a statute, such right arises from the Hawaii Constitution, there will be no need to decide the federal constitutional ques-

tion raised in plaintiff's complaint. Similarly, if the Hawaii Supreme Court rules that Hawaii law permits write-in voting, and if State election officials then provide for such voting, there will be no need to decide the federal constitutional question.

For the foregoing reasons the above issues of Hawaii law are determinative of the cause within the meaning of Haw. R. App. P. 13. Should the Hawaii Supreme Court answer any or all of the certified questions, any party may transmit the same forthwith to this court and may initiate such further proceedings as are consistent with the Hawaii Supreme Court's decision and with the court of appeals mandate.

III. CERTIFIED QUESTIONS

(1) Does the Constitution of the State of Hawaii require Hawaii's election officials to permit the casting of write-in votes and require Hawaii's election officials to count and publish write-in votes?

(2) Do Hawaii's election laws require Hawaii's election officials to permit the casting of write-in votes and require Hawaii's election officials to count and publish write-in votes?

(3) Do Hawaii's election laws permit, but not require, Hawaii's election officials to allow voters to cast write-in votes, and to count and publish write-in votes?

IV. CONCLUSION

Pursuant to Hawaii Rule of Appellate Procedure 13, this court respectfully requests that the Hawaii Supreme Court consider the above questions of Hawaii law and, if appropriate, answer the same by written opinion.

DATED: Honolulu, Hawaii, August 9, 1988

/s/
HAROLD M. FONG
United States District Judge

UNITED STATES COURT OF APPEALS
NINTH CIRCUIT

ALAN B. BURDICK,
Plaintiff-Appellee,

v.

MORRIS TAKUSHI, Director of Elections, State of Hawaii; JOHN WAIHEE, Lieutenant Governor, State of Hawaii,
Defendants-Appellants.

Nos. 86-2689, 86-2703

UNITED STATES COURT OF APPEALS
NINTH CIRCUIT

Argued and Submitted Aug. 13, 1987

Decided May 17, 1988

Steven S. Michaels, Deputy Atty. Gen., State of Hawaii, Honolulu, Hawaii, for defendants-appellants.

Mary Blaine Johnston, Brown, Johnston and Day, Honolulu, Hawaii for plaintiff-appellee.

Appeal from the United States District Court for the District of Hawaii.

Before NORRIS and NOONAN, Circuit Judges, and SMITH,* District Judge.

NORRIS, Circuit Judge:

In May 1986, Appellee Burdick notified Appellants Takushi and Waihee (Hawaii's Director of Elections and Lieutenant Governor, respectively) that he wished to cast

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* The Honorable Russell E. Smith, United States District Judge for the District of Montana, sitting by designation.

a write-in vote in the upcoming September primary. After consulting with the State Attorney General, appellants informed Burdick that Hawaii election laws do not provide for write-ins and that such votes would be disallowed or ignored. Burdick filed suit in federal district court claiming that in the upcoming primary and in future primaries and general elections he wished to vote for persons whose names would not appear on the printed ballot and that a ban on such write-in voting violates the United States Constitution. The district court agreed and granted summary judgment for Burdick.

Appellants argue that the district court have abstained from deciding the merits of Burdick's constitutional challenge because it is unclear whether Hawaii's election laws prohibit write-in voting.[1] We agree.

The Supreme Court has made it clear that "federal courts should abstain from decision when difficult and unsettled questions of state law must be resolved before a substantial federal question can be decided." *Hawaii Housing Auth. v. Midkiff*, 467 U.S. 229, 236, 104 S.Ct. 2321, 2327, 81 L.Ed.2d 186 (1984)(citing *Railroad Comm'n v. Pullman Co.*, 312 U.S. 496, 61 S.Ct. 643, 85 L.Ed. 971 (1941). Our circuit has adopted a three-part test to determine whether *Pullman* abstention is warranted. First, the proper resolution of the state law question at issue must be uncertain. Second, a definitive ruling on the state issue must potentially obviate the need for constitutional adjudication by the federal court. Third, the complaint must touch upon "a sensitive area of social policy upon which the federal courts ought not to enter unless no alternative to its adjudication is open."

[1] Although appellants raise this argument for the first time on appeal, *Pullman* abstention is not waivable by the parties and thus the issue is properly before us. *Ohio Bureau of Employment Services v. Hodory*, 431 U.S. 471, 480 n.11, 97 S.Ct. 1898, 1904 n. 11, 52 L.Ed.2d 513 (1977).

Bank of America Nat'l Trust and Savings Assoc. v. Summerland City. Water Dist., 767 F.2d 544, 546 (9th Cir. 1985)(quoting *Canton v. Spokane School Dist.*, No. 81, 498 F.2d 840, 845 (9th Cir. 1974).

With respect to the first criterion, the course of this litigation makes it plain that the question whether Hawaii's election law prohibits write-in voting is an unsettled question of state law. At some time or other, each party seems to have argued both sides of the coin: either that Hawaii's ban on write-in voting is mandated by statute or that the ban is not statutory, but rather arises solely from the administrative policy of state election officials. *See* Appellants' Opening Br. at 48; Appellee's Br. at 36-38. Curiously, the district court and the appellee (in his current interpretation) are at odds on the issue. The district court concluded that "plaintiff's complaint arises not from any specific Hawaii law, but from defendants' interpretation of that law." Order of September 29 at 4. Yet, on appeal, appellee urges this court to treat Hawaii's prohibition on write-in voting as statutorily based. Appellee's Br. at 38.

Such confusion is hardly surprising. Hawaii's election laws are devoid of any reference to write-in voting. Although taken collectively several sections of the Hawaii elections code may be read to prohibit write-ins these sections may also be read as merely foreclosing ballot access to write-in candidates while placing no restrictions on the right of voters to cast write-in ballots for the candidates of their choice.[2]

[2] Hawaii Rev. Stat. §12-1 requires that "All candidates for elective office, except as provided for in section 14-21 [for Presidential Electors], shall be nominated in accordance with this chapter and not otherwise." Section 12-2 specifies that "No person shall be a candidate for any general or special general election unless the person has been nominated in the immediately preceding primary or special primary." Section 16-25 provides that "Each ballot shall be counted . . . as to all

(continued...)

We agree with the district court, Order of October 8 at 10-12, that *Jensen v. Turner*, 40 Haw. 604 (1954), which appellants cite for the proposition that Hawaii has never allowed write-in voting, does not provide a controlling interpretation of Hawaii law. The sole question before the Hawaii court in *Jensen* was whether an act covering two subject matters, machine voting and write-in voting, violated Title 45 of the Organic Act which requires that each law shall "embrace but one subject, which shall be encompassed in its title." Since the title of the act at issue did not mention write-in voting, the *Jensen* court struck down the write-in voting portion of the law. Although the Court assumed that Hawaii law prohibited write-in voting, that assumption was wholly unnecessary to the decision of the case and was made in the context of Hawaii's old election statutes, not those currently in effect.

In sum, neither the plain language of Hawaii statutes nor any definitive judicial interpretation of those statutes establishes that the Hawaii legislature has enacted a ban on write-in voting. Especially considering the ease with the Hawaii legislature could have expressly authorized such a ban, if intended, we decline to find by implication a statutory prohibition on write-in voting.

Faced with this lack of clear legislative direction, the district court treated Burdick's claim not as a facial challenge to a statutory prohibition on write-in voting, but as a §1983 action against individual state election officials for the deprivation of Burdick's constitutionally protected right to cast a write-in ballot. Order of September 29 at 4. Ordinarily, we would agree that a plaintiff may sue state officials under §1983 for the alleged deprivation of

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[2] (...continued)
the candidates . . . ." And Section 16-26(1) further provides that ballots which contain "any mark or symbol contrary to the provisions of law" shall be considered "questionable" and set aside uncounted.

his constitutional rights regardless of whether the state law upon which those officials based their actions was susceptible of clear interpretation. In this case, however, the actions of the defendant state officials are inseparable from the state laws underlying their actions. Defendants Takushi and Waihee claim no independent authority or discretion to determine whether Hawaii provides for the casting and counting of write-in votes. Their opinion that Hawaii law prohibits write-in voting was, it appears, based solely on their reading of the relevant statutes and in no way reflected an exercise of executive authority separate from their duty to implement the election rules established by the legislature.

Under the circumstances, a definitive resolution of the unsettled question whether Hawaii's election laws actually prohibit write-in voting might obviate the need for a federal court to decide the federal constitution question raised by Burdick's claim. If the Hawaii state courts were to decide that Hawaii law permits write-in voting -- a not insubstantial possibility as we read Hawaii law -- then we may presume that Hawaii election officials would administer the election laws accordingly. Thus, the second prong of our abstention test has been satisfied.

Finally, this case does touch upon "a sensitive area of social policy" into which federal courts should intrude with great reluctance. State election codes are the product of careful consideration at the local level about how to ensure fair and orderly elections. The authority of states to enact such codes derives from the Constitution itself. *See* Article I, Sec. 4, cl. 1. Federal courts should refrain from deciding the constitutionality of state election laws when reasonable alternatives to such adjudication are available.

In conclusion, we hold that this is an appropriate case for *Pullman* abstention. The state laws which lie at the heart of this case are "'fairly subject to an interpreta-

tion which will render unnecessary' adjudication of the federal constitutional question." *Hawaii Housing Auth.*, 467 U.S. at 236, 104 S.Ct. at 2327 (quoting *Harman v. Forssenius*, 380 U.S. 528, 535, 85 S.Ct. 1177, 1182, 14 L.Ed.2d 50 (1965). Accordingly, we vacate the district court's judgment and remand with instructions to abstain from deciding the federal constitutional issue in this case pending a determination by the state courts of the question whether Hawaii election laws permit write-in voting. *See Kollsman v. City of Los Angeles*, 737 F.2d 830, 837 (9th Cir. 1984).

IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF HAWAII

ALAN B. BURDICK, Plaintiff, vs. MORRIS TAKUSHI, Director of Elections, State of Hawaii, et al., Defendants.	)	CIVIL NO. 86-0582

ORDER GRANTING MOTION FOR SUMMARY JUDGMENT AND FOR PERMANENT INJUNCTION

Plaintiff's Motion for Summary Judgment and Preliminary and Permanent Injunctive Relief came on for hearing before this court on September 29, 1986. Mary Blaine Johnston and Alan Burdick appeared on behalf of plaintiff, and Lawrence Hines and Charlene Aina appeared on behalf of defendants. The court, having reviewed the motion and the memoranda in support thereof and in opposition thereto, having heard the oral arguments of counsel, and being fully advised as to the premises herein, finds as follows:

The facts of this case are simple and undisputed. Hawaii law makes no provision for the casting or the counting of write-in votes on ballots in its statewide elections. In early June 1986, plaintiff made known his desire to cast a write-in vote in the primary election scheduled to be held on September 20, 1986. Defendants, the Director of Elections and the Lieutenant Governor (who serves as the Chief Elections Officer), consulted with the office of the State Attorney General and

then advised plaintiff on July 11, 1986 that write-in votes will continue to be disallowed or ignored.

This lawsuit was filed on August 21, 1986. The court granted a motion to shorten time on the hearing of the instant motion on September 11, 1986. On September 20, 1986, the State held its primary election. As a result of that election, plaintiff states that in some electoral contests he wishes to cast a write-in vote in the general election now scheduled to be held on November 4, 1986, some 36 days from the date of the hearing of the instant motion.

Because the facts are undisputed, the court first considers the motion for summary judgment. If plaintiff is entitled to judgment as a matter of law pursuant to Rule 56(c) of the Federal Rules of Civil Procedure, that motion will be dispositive and the court need not engage in the balancing test by which motions for preliminary injunctive relief are judged.

A. Laches

Defendants first argue that plaintiff is barred from bringing this suit by the doctrine of laches. In order to prove laches, defendants must show (1) an inexcusable delay by the plaintiff in asserting his rights, and (2) undue prejudice to the defendant as a result. *Knox v. Milwaukee County Board of Elections Commissioners*, 581 F.Supp. 399, 402-03 (E.D. Wis. 1984). If plaintiff could have brought suit earlier but improperly delayed, and if an injunction would delay the election, disenfranchise absentee voters or cause widespread confusion and chaos in the electoral process, injunctive relief will be denied. *Williams v. Rhodes*, 393 U.S. 23 (1968); *Fishman v. Schaffer*, 429 U.S. 1325 (1976); *Populist Party v. Herschler*, 746 F.2d 656, 658 (10th Cir. 1984); *Knox*, *supra*; *Maddox v. Wrightson*, 421 F.Supp. 1249 (D. Del. 1976).

Defendants argue that plaintiff had standing to bring this action months ago, citing to *Joyner v. Mofford*, 706

F.2d 1523, 1526 (9th Cir. 1983). The court is not persuaded that the facts support such a charge. Hawaii law is silent on the right to cast a write-in vote, and plaintiff properly enquired of defendants (prior to bringing the action into court) whether he would be able to do so in a timely fashion. Not until July 11, 1986 -- slightly more than a month before the complaint was filed -- did defendants definitively respond.[1] Not until July 28, 1986, the day after the filing deadline for the primary election, did plaintiff know with certainty that he wanted to cast a write-in vote in November. In addition, through no fault of plaintiff's, the hearing of this motion was delayed almost three weeks by order of the court.

The court recognizes that an adverse decision at this juncture would undoubtedly cause some inconvenience to election officials. Nevertheless, defendants have not shown that plaintiff improperly delayed in bringing this action. Moreover, they have failed to demonstrate undue prejudice to themselves. The affidavit of Dwayne Yoshida submitted by defendants establishes that the turnaround time for printing absentee ballots is less than a week; the time required for printing all ballots is less than four weeks. If this court should rule in plaintiff's favor, the court is confident that defendants would be able to accommodate any requirement that they provide for write-in votes.

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[1] Defendants contend plaintiff should have known that the office of the Lieutenant Governor is without the authority to adjudicate constitutional questions, and that plaintiff should have filed suit immediately. This argument begs the question. Plaintiff could reasonably expect that defendants would read the election laws as permitting write-in votes, thus dispensing with the need for an adversarial proceeding.

B. Merits of the Action

The ultimate issue in this case is whether an individual has a constitutional right to have his write-in vote accepted and tallied in the election. This court therefore finds that defendants' characterization of the issue as simply an equal protection question is inapt. That all Hawaii voters are equally burdened by the inability to cast a write-in vote is of no moment; the proper focus is on the fact that petitioner's ability to vote for the candidate of his choice is circumscribed by defendants' interpretation and application of the election laws.

Because plaintiff's complaint arises not from any specific Hawaii law, but from defendants' interpretation of that law, the court will consider this case as an action brought pursuant to 42 U.S.C. §1983, to redress the deprivation of civil rights under color of state law. Plaintiff alleges that defendants have violated his First Amendment right (applicable to the states through the incorporation provision of the Fourteenth Amendment) of expression and association.

The Supreme Court has held recently that constitutional challenges to specific provisions of state election laws should be governed by a balancing test. *Anderson v. Celebrezze*, 460 U.S. 780, 789, 103 S.Ct. 1564, 1570 (1983). Under this test,

> . . . a court must first consider the character and magnitude of the asserted injury to the rights protected by the First and Fourteenth Amendments that the plaintiff seeks to vindicate. It then must identify and evaluate the precise interests put forward by the State as justifications for the burden imposed by its rule. In passing judgment the Court must not only determine the legitimacy and strength of each of those interests; it also must consider the extent to which those

> interests make it necessary to burden the plaintiff's rights. Only after weighing all these factors is the reviewing court in a position to decide whether the challenged provision is unconstitutional.

Id. at 789, 1570. Because plaintiff here challenges a specific interpretation of the election law, the *Anderson* test applies. This court will accordingly weigh the asserted injury against the justifications offered for burdening plaintiff's rights.

The right to vote in this society is so fundamental as almost to dispense with the need for discussion. "What the Constitution condemns are restrictions that, without compelling justification, significantly encroach upon the rights to vote and to associate for political purposes." *Unity Party v. Wallace*, 707 F.2d 59, 62 (2d Cir. 1983). Defendants in this case have adopted the position that plaintiff may legitimately vote only for a candidate whose name appears on the ballot, or for no one at all. However,

> [t]he electoral process is a matter of a majority of qualified voters selecting a candidate to fill a political office and a state cannot arbitrarily impair the freedom of choice which a qualified voter may exercise on election day.

Socialist Labor Party v. Rhodes, 290 F.Supp. 983, 987 (S. D. Ohio (three-judge court), *aff'd* in part, *mod.* in part, *sub nom. Williams v. Rhodes*, 393 U.S. 23, 89 S.Ct. 5 (1968). When a voter does not choose to vote for any of the candidates listed, a write-in ballot permits him to exercise effectively his individual constitutionally protected franchise. *Id.*

A ban on write-ins affects the right to vote in two ways. First, it may prevent a candidate preferred by a majority of voters from winning election, especially

where significant political changes have occurred between the primary and the general elections.[2] Second, and more basically, it prevents individual voters from casting ballots for their preferred candidates, whether or not those candidates have any chance of winning election. *Canaan v. Abdelman*, 40 Cal.3d 703, 221 Cal. Rptr. 468, 476 (1985).

It is important to note that plaintiff is not asking that his candidate's name be placed on the ballot, but only that plaintiff be allowed to vote for the candidate of his choice. Defendants argue that "not all restrictions regarding who may be a candidate or who voters may vote for, are constitutionally suspect." This analysis views the issue from the wrong side. A ban on write-in votes strikes directly at the right to vote, irrespective of the actions of a candidate in failing to qualify for placement on the ballot. This court focuses today only on the rights of the voter, and not on those of the candidate. The governmental interests which have been held to justify restrictions on the right to be listed as a candidate are not applicable to write-in candidacy. *Canaan*, *supra*,

[2] Such an occurrence is not as farfetched as it might appear. The court takes note that, in Hawaii, the frontrunning candidate for governor in the recently-held Democratic primary election attributed his defeat to a "smear" campaign launched by unknown sources on the eve of the election. The office of the State Attorney General is currently investigating the dissemination of a confidential report linked to the smear campaign. Conceivably, if the results of that investigation are made public before the upcoming general election, the potential political backlash could have a considerable effect on voters' desire to cast write-in votes in that or in other electoral contests.

at 715.[3]

Defendants correctly state that the Supreme Court has not specifically defined a right to cast a write-in vote. Nevertheless, in two cases related to this issue, the Court noted in upholding other restrictions that write-in voting *was* available as an alternative. *See Jenness v. Fortson*, 403 U.S. 431, 434, 91 S.Ct. 1970, 1972 (1971); *Williams v. Rhodes*, 393 U.S. 23, 89 S.Ct. 5 (1968). A strong argument could therefore be made that Supreme Court authority implies a right to a write-in vote. Indeed, the Court of Appeals for the Second Circuit has explicitly relied on the write-in alternative to find a restriction valid. *Unity Party*, *supra*, at 63.

Looking exclusively at the effect on the individual voter and ignoring the potential rights of candidates -- or even of voters to place a particular name on the ballot -- this court finds that plaintiff has shown that defendants propose to inflict substantial injury to his First Amendment rights. Against this burden, the court must weigh the following governmental interests identified by defendants: (1) ensuring that all candidates who run for office in the general election satisfy all statutory requirements for the office sought and are willing to serve: (2) allowing the public adequate time to evaluate and investigate the candidates' qualifications; and (3) protecting the integrity of the State's electoral process by minimizing errors committed by voters and ballot handlers.

The first two of these interests were considered at length and rejected by the California Supreme Court in

[3] *See also Kamins v. Board of Elections, District of Columbia*, 324 A.2d 187 (D.C. App. 1974). This court will therefore disregard defendants' authority upholding restrictions on the printing of a candidate's name on the ballot. *See, e.g., Hall . Simcox*, 766 F.2d 1171 (7th Cir. 1985); *Belluso v. Poythress*, 485 F.Supp. 904 (N.D. Ga. 1980).

Canaan, supra.[4] This court will reach the same conclusion in fewer words. First, allowing write-in voting does not mean that a candidate who cannot meet other qualifications will be allowed to take office. The State certainly retains the ability to reject candidates for any number of valid reasons. Nevertheless, such an objective can be achieved by less restrictive alternatives than by foreclosing the right of the voters to exercise their freedom of choice. The court finds any such effort to dissuade voters from casting votes, simply because a candidate will not ultimately serve, to be unduly paternalistic.

Second, this court has held recently that the State does have a legitimate interest in ensuring that the voters have time to evaluate the merits of any given candidacy. *See Hankins v. State*, 639 F. Supp. ____ (D. Hawaii 1986). Yet, such an interest is not met by a blanket prohibition on write-in votes. The write-in candidate is already at a severe disadvantage when a voter enters a voting booth, because the candidate's name does not appear on the ballot. The voter must be familiar with the candidate -- at least to the extent of knowing his name -- before being able to cast a vote for that candidate. This court considers extremely remote the possibility that an unknown write-in candidate will win election.

The third interest cited by defendants is the protection of the integrity of Hawaii's electoral process. The defendants in *Canaan* did not make such an argument, which demonstrates nothing more than a reluctance to adapt to changing conditions. Defendants are apparently

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[4] Defendants submit that plaintiff's reliance on state court decisions, and the paucity of relevant federal authority, indicates that "the issue lacks constitutional proportion." This court disagrees. That federal courts have rarely been called upon to decide this issue suggests that voters have been successful in seeking relief in the state courts in those few jurisdictions which do not recognize the right to cast a write-in vote. For a catalogue of federal and state decisions discussing this issue, see *Canaan, supra*, at 725 n.22.

concerned that, if the court orders inclusion of space for write-in votes on the ballot, they will not have time to test the new system for flaws. Even if they can make such tests, they argue that write-in balloting will encumber the process.

While recognizing the inconvenience such an order would cause, this court is certain that the defendants possess the resources to implement and to execute an accommodation for write-in balloting in a timely and effective manner. Obviously, the provision for space on the ballot itself will involve no more than a relatively minor change in the order submitted to the printer.

Moreover, as to the processing and counting of the write-in ballots,[5] defendants should be able to design and to implement a method of recording such votes within the time remaining before the general election. Defendants must remember that they would not be asked to strike out on some uncharted path, but rather to conform Hawaii's balloting process with that used by the majority of jurisdictions in the nation. Undoubtedly, defendants' counterparts in other states would prove helpful in explaining to defendants how to cope with the technical problems of processing write-in votes.

This court is likewise not persuaded by the other concerns raised by defendants: possible ambiguity as to the write-in candidate's identity and time spent in counting the ballots. An order mandating the provision for write-in ballots would not mean, of course, that the State

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[5] Defendants paint an apocalyptic picture of election officials forced to count three million ballots by hand in the upcoming general election. The court does not share defendants' gloomy prognostication. First, the court will take judicial notice that less than 400,000 persons are registered to vote in the upcoming election, not all of whom will actually vote. Second, the number of write-in votes itself can hardly be expected to be significant. The ability to cast such a vote is a privilege, not an obligation.

could not void ballots cast for unidentifiable candidates. As to any delay caused by the hand-counting of write-in votes, that fact alone -- if it is true -- is insufficient justification for abridging First Amendment freedoms.

The administrative difficulty outlined by defendants is apparently one which can be solved without impeding the election machinery. *See Kamins*, *supra*, at 193. Defendants oppose the procedural change because Hawaii has not allowed write-in voting since it became a state in 1959, and because it has used electronic key-punch machines for the last 14 years. Nevertheless, inertia is not a legitimate reason for trammeling constitutional rights. Defendants have an obligation to prove receptive when a change is in the beneficial interest of Hawaii residents. The availability of a write-in candidacy not only provides the flexibility to deal with unforeseen political developments and to help ensure that the voters are given meaningful options on election day, *Canaan*, *supra*, at 719, but it is also constitutionally required.

Of course, it goes virtually without saying that the ability to cast a write-in vote includes a right to have that vote considered. To afford a voter the opportunity to write in the name of his candidates, and then to ignore that vote, is to offer a hollow right indeed. *See Canaan*, *supra*, at 718. The State must not only provide for write-in votes, it must also count, record, and consider votes so cast equally with all others cast in the election. *Socialist Labor Party*, *supra*, at 992.

This court has weighed the burden on plaintiff's rights against the interests asserted by the defendants and finds that the refusal to permit write-in voting violates the plaintiff's constitutionally guaranteed freedom of expression and association. Defendants' speculative arguments about the possible consequences of allowing write-in voting do not justify burdening the right to vote. *Canaan*, *supra*, at 723.

Because plaintiff has demonstrated that he is entitled to prevail in this case as a matter of law, summary judgment is appropriate. Accordingly, IT IS HEREBY ORDERED that plaintiff's motion for summary judgment be, and the same is, GRANTED. Judgment shall be entered in favor of plaintiff and against defendants. Because plaintiff has demonstrated that he is entitled to injunctive relief, IT IS FURTHER ORDERED that the motion for a permanent injunction be GRANTED.

IT IS FURTHER ORDERED that defendants comply immediately with the terms of this order by causing ballots for the November 1986 general election to provide for the casting of write-in votes equal to the total number of candidates to be elected in each electoral contest, and that defendants provide for the counting, recording, and tabulation of such write-in votes. The court recognizes that one or more write-in candidates may ultimately garner a majority or a plurality of the votes cast. At this time, however, the court does not rule upon the eligibility of such a person or persons to take office.

Upon the representation by defense counsel that defendants will voluntarily comply with plaintiff's request for dissemination of information to the public regarding the right to cast write-in votes, this court will make no findings as to plaintiff's right to demand the same. As to plaintiff's request for attorneys' fees pursuant to 42 U.S.C. §1988, plaintiff is directed to file a separate motion requesting such fees.

IT IS SO ORDERED.

DATED: Honolulu, Hawaii, September 29, 1986

/s/
HAROLD M. FONG
United States District Judge

CONSTITUTIONAL AND STATUTORY PROVISIONS

The First Amendment to the United States Constitution provides, in pertinent part:

> Congress shall make no law . . . abridging the freedom of speech, or of the press; or the right of the people peaceably to assemble, and to petition the Government for a redress of grievances.

The Fourteenth Amendment to the United States Constitution provides, in relevant part:

> **Section 1.** All persons born or naturalized in the United States, and subject to the jurisdiction thereof, are citizens of the United States and of the State wherein they reside. No State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any State deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws.

Hawaii Revised Statutes, Section 12-1 provides:

> **§12-1 Application of chapter.** All candidates for elective office, except as provided in section 14-21, shall be nominated in accordance with this chapter and not otherwise.

Hawaii Revised Statutes, Section 12-2 provides, in relevant part:

> . . . No person shall be a candidate for any general or special general election unless the person has been nominated in the immediately preceding primary or special primary.

Hawaii Revised Statutes, Section 12-41 provides:

> **§12-41 Result of election.** (a) The person or persons receiving the greatest number of votes at the primary or special primary as a candidate of a party for an office shall be the candidate of the party at the following general or special general election but not more candidates for a party than there are offices to be elected; provided that any candidate for any county office who is the sole candidate for that office at the primary or special primary election, or who would not be opposed in the general or special general election by any candidate running on any other ticket, nonpartisan or otherwise, and who is nominated at the primary or special primary election shall, after the primary or special primary election, be declared to be duly and legally elected to the office for which the person was a candidate regardless of the number of votes received by that candidate.
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> (b) Any nonpartisan candidate receiving at least ten percent of the total votes cast for the office for which the person is a candidate at the primary or special primary, or a vote equal to the lowest vote received by the partisan candidate who was nominated in the primary or special primary, shall also be a candidate at the following election; provided that when more nonpartisan candidates qualify for nomination than there are offices to be voted for at the general or special general election, there shall be certified as candidates for the following election those receiving the highest number of votes, but

not more candidates than are to be elected.

Hawaii Revised Statutes, Section 16-1 provides:

> **§16-1 Voting systems authorized.** The chief election officer may adopt, experiment with, or abandon any voting system authorized under this chapter or to be authorized by the legislature. These systems shall include, but not be limited to voting machines, paper ballots, and electronic voting systems. All voting systems approved by the chief election officer under this chapter are authorized for use in all elections for voting, registering, and counting votes cast at the election.
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> Voting systems of different kinds may, at the discretion of the chief election officer, be adopted for different precincts within the same district. The chief election officer may provide for the experimental use at any election, in one or more precincts, of a voting system without a formal adoption thereof and its use at the election shall be as valid for all purposes as if it had been permanently adopted; provided that if a voting machine is used experimentally under this paragraph it need not meet the requirements of section 16-12.

Hawaii Revised Statutes, Section 16-22 provides:

> **§16-22 Marking.** The method of marking a paper ballot shall be prescribed by the chief election officer by rules and regulations promulgated in accordance with chapter 91. The chief election officer shall prescribe a uniform method of marking the ballots in all precincts in a county and for absentee voting

by paper ballot.

Hawaii Revised Statutes, Section 16-26 provides:

> **§16-26 Questionable ballots.** A ballot shall be questionable if:
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> (1) A ballot contains any mark or symbol whereby it can be identified, or any mark or symbol contrary to the provisions of law; or
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> (2) Two or more ballots are found in the ballot box so folded together as to make it clearly evident that more than one ballot was put in by one person, the ballots shall be set aside as provided below.
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> Each ballot which is held to be questionable shall be endorsed on the back by the chairman of precinct officials with the chairman's name or initials, and the word "questionable." All questionable ballots shall be set aside uncounted and disposed of as provided for ballots in section 11-154.